NO. [redacted] 85

MAY 13 1955

HAROLD B. WILLEY, CL

In the Supreme Court of the United States

THE MARTIN BROTHERS BOX COMPANY, a corporation,

Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION and SOUTHERN PACIFIC COMPANY, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE L. QUINN, JR.,
815 15th St. N.W.,
Washington 5, D. C.,

IRVING RAND,
DONALD A. SCHAFER,
Public Service Building,
Portland 4, Oregon,
Attorneys for Petitioner.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 4-55

INDEX

Page

Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit 1

Opinions Below 2

Statement of Jurisdiction 2

Question Presented 2

Statutes Involved 3

Statement of the Case 3

Reasons for Granting the Writ 6

Conclusion 10

Appendix A

Opinions of the Court of Appeals

Judge Healy 1

Judge Chambers 11

Judge Pope 12

Opinion of the District Court 33

Appendix B

Statutes 61

CITATIONS

CASES

	Page
B. & O. R. Co. vs. United States, 333 U.S. 169	8
Florida East Coast Line vs. United States, 234 U.S. 167	7
United States vs. Interstate Commerce Commission, 337 U.S. 426	5
United States vs. Interstate Commerce Commission, 198 F. 2d 958	8

STATUTES

Interstate Commerce Act	
Sec. 1(4)	3
Sec. 1(11)	3
Sec. 3(1)	3
Sec. 9	3, 5
Sec. 17(9)	3, 5
Administrative Procedure Act, Sec. 1009(e)	3, 5
28 U.S.C., Sec. 41 and Secs. 43-48	3, 5

In the Supreme Court
of the United States

THE MARTIN BROTHERS BOX COMPANY, a corporation,

Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION and SOUTHERN PACIFIC COMPANY, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, The Martin Brothers Box Company, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the cause in said Court entitled Interstate Commerce Commission, et al., Appellants, vs. The Martin Brothers Box Company, a corporation, Appellee, on January 10, 1955, Petition for Rehearing, applied for within the time provided by the rules of said Court, denied March 1, 1955.

OPINIONS BELOW

The opinion, concurring opinion and dissenting opinion of the Court of Appeals (Appendix 1-31; Record 846-868) are reported in 219 F. 2d 811.

The opinion of the District Court of the United States for the District of Oregon (App. 33-59; R. 42-75) is reported in 128 F. Supp. 919).

The report of the Interstate Commerce Commission (R. 108-126) is reported in 280 I.C.C. 395. The proposed report of the Examiner is in the Record pages 84-106.

STATEMENT OF JURISDICTION

Judgment of the United States Court of Appeals for the Ninth Circuit was dated and entered January 10, 1955 (R. 869). Petition for Rehearing filed within the time allowed by its rules was denied March 1, 1955 (R. 870). Jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1), 28 U.S.C.A. § 1254 (1).

QUESTION PRESENTED

Is it within the exclusive province of the Interstate Commerce Commission to interpret the provisions of the Interstate Commerce Act prohibiting undue preferences among interstate shippers of freight by railroad and prohibiting undue discrimination against a particular shipper to the substantial damage of the shipper discriminated against? When the Commission found on substantial evidence and with no evidence to the contrary that shippers generally were supplied with 80 per-

cent or more of the cars required, while the shipper discriminated against was furnished only about 30 percent of the cars required and was substantially damaged, but did not show that it was in a competing business with the favored shippers, is the Commission conclusion that the discrimination was not undue or unreasonable under the Act binding upon and conclusive against the Courts? Or does such a conclusion present an issue of law which it is the duty of the courts to examine and decide?

STATUTES INVOLVED

The statutory provisions involved are the Interstate Commerce Act, 49 U.S.C.A. §§ 1(4), 1(11), 3(1), 9, and 17(9); and the Administrative Procedure Act of 1946, 5 U.S.C.A. § 1009 (e). These are printed in Appendix B. District Court jurisdiction rested upon 28 U.S.C. § 41 and §§ 43-48 (28 U.S.C.A. §§ 1336, 1398, 2321, 2322, 2323, 2324 and 2325).

STATEMENT OF THE CASE

The facts found by the Commission, based upon substantial evidence in the record (as to which neither any member of the Commission, nor the District Judge, nor any of the three Court of Appeals Judges had any difference of opinion) are:

During the period from January 1 to September 30, 1947, or portions of this time, there existed a general shortage of railroad freight cars on the lines of the defendant railroad, which was operating as a common carrier of freight in interstate commerce.

The petitioner was operating at Oakland, Oregon, a small town on the Siskiyou line of the carrier, which was not served by any other railroad, a wirebound box manufacturing plant, and required for transportation of petitioner's products by railroad in interstate commerce from 8 to 13 railroad cars per working day. During this peiod of 191 working days the carrier supplied for transportation of petitioner's products in interstate commerce a total of 593 cars, or an average of 3.1 cars per working day, or about 30 percent of its car requirements.

During this same time the railroad furnished to other shippers along its lines, for transportation of their products, an average of 80 percent of all the freight cars required by them, and at points on its lines where competition with other railroads existed gave shippers better service.

The Interstate Commerce Commission, having considered the evidence establishing these facts and having determined these to be the facts then made certain conclusions:

1. The shipper discriminated against, a wirebound box manufacturer, had not established that any of its competitors was unduly preferred by the practices of the railroad (R. 121).

2. The proof of the damages resulting from this discrimination was not sufficient to support an award of reparations in a court (R. 126).*

3. The petitioner's complaint demanding adequate car service and reparations should be dismissed (R. 126).

---

*The District Court and also the Court of Appeals (except for Judge Healy) found the shipper's proof sufficient to support an award of reparations.

Upon a petition to the District Court of the United States for the District of Oregon to review this decision of the Commision, the trial court reviewed the record before the Commission and determined and adjudged that the facts found as facts by the Commission were based upon substantial evidence in the record, but that the conclusions of the Commission had no rational basis in law in view of the facts so found. The District Court set aside the Commission's order and remanded the matter to the Commission for further proceedings.

On appeal by the Commission and by the carrier to the Court of Appeals for the Ninth Circuit the case was reversed by a divided court. The several opinions are discussed below.

Authority of the Interstate Commerce Commission to hear the complaint of petitioner in the first instance is found in section 9 of the Interstate Commerce Act (49 U.S.C.A. § 9).

The jurisdiction of the District Court rested upon the Urgent Deficiencies Act of 1913, 28 U.S.C. §§ 41, 43-48, 28 U.S.C.A. §§ 1336, 1398, 2321, 2322, 2323, 2324, 2325 and section 17(9) of the Interstate Commerce Act, 49 U.S.C. § 17, 49 U.S.C.A. § 17.

Judicial review of arbitrary and capricious administrative action is afforded also by the Administrative Procedure Act of 1946, 5 U.S.C.A. § 1009(e).

For a one judge determination rather than a three judge District Court, and appeal to the Court of Appeals rather than this Court, see U. S. vs. I.C.C., 337 U.S. 426, 441.

REASONS FOR GRANTING THE WRIT

Since railroad freight car service and the free and unhindered movement of goods in interstate commerce are of vital importance to the nation and all its citizens, the general importance of the questions presented by this case seems clear.

As illustrative of the importance of the questions presented, Judge Pope in his dissenting opinion in the court below stated:

> "If this decision stands the railroads can proceed, wholly without hindrance from the Commission, so to pick and choose among shippers that they will, in many instances, be exercising the power to say which industries shall live and which shall die. What has happened here appears to me to be an unthinkable abnegation of its duties by the Commission." (R. 855; App. 13)

The decision of the court below is in conflict with the applicable decisions of this Court, as well as the applicable decisions of other courts of appeal. Also, the decision raises an important question of federal law which has not been, but should be, settled by this Court.

The Commission determined as a fact that during the time the petitioner was being supplied with about 30 percent of the cars required to transport petitioner's products in interstate commerce favored shippers were being supplied an average of 80 percent of their requirements. The Commission further found as a fact that at locations on the railroad's lines where shippers had access to other competing lines for movement of their

products these shippers experienced no difficulty in obtaining cars (R. 116). Having made these findings, the Commission then concluded that it had not been shown that the railroad engaged in any unreasonable or otherwise unlawful practice or subjected petitioner to any undue prejudice.

All of the evidence and the findings of the Commission and the opinions of all the reviewing judges confirm the supplying of petitioner with about 30 percent of the car service needed by it and the supplying of favored shippers not in competition with petitioner with an average of 80 percent of the car service required by them.

Based on these facts the Commission's conclusion was that the discrimination was not undue or unlawful. The District Court found this discrimination undue and unlawful as a matter of law. In the Court of Appeals Judge Pope found this discrimination undue and unlawful as a matter of law. Judge Chambers said the Examiner found an unfair discrimination by Southern Pacific Company and that he would uphold the Examiner if he had "latitude" so to do (R. 854; App. 11). Judge Healy, without expressing any opinion as to whether the discrimination was undue or unlawful, was of opinion that:

> "Whether given rates or practices are 'reasonable' or 'unduly prejudicial' are factual determinations confided by Congress to the judgment and discretion of the Commission." (R. 849; App. 5)

The decision of Judge Healy, apparently concurred in by Judge Chambers, is in direct conflict with the decision of this Court in the case of Florida East Coast

Line vs. U. S., 234 U.S. 167, 185. This Court held in this case where, as in the present case, the order of the Commission was rendered without any evidence whatever to support it, "The consideration of such a question involves not an issue of fact, but one of law which it is the duty of the courts to examine and decide."

This Court has uniformly condemned discriminatory practices by carriers subject to the Interstate Commerce Act, and as stated in B. & O. R. Co. vs. U. S., 333 U.S. 169, the Act and all amendments to it have aimed at wiping out discriminations of all types.

The decision of the majority in this case is also in conflict with the decision of the Court of Appeals for the District of Columbia in the case of U. S. vs. I.C.C., 198 F. 2d 958, certiorari denied 344 U.S. 893, which case determines that upon a review of a final order of the Interstate Commerce Commission the provisions of the Administrative Procedure Act, affording full latitude to the courts, are to be used. This case was decided on its merits with the entire record considered and weighed. The Court proceeded to "examine the legal and factual basis for each of these conclusions" of the Commission (198 F. 2d at 965). The Court said that while the Commission's views as to questions of law arising in the course of its duties are entitled to weight, nevertheless, "there are occasions even in this field where the courts are required to apply 'the fixed law to the established fact' " (198 F. 2d at 968).

It is thus clear that the decision of the court below is in conflict with the decisions of this Court and the decisions of other courts of appeal in holding that it is beyond the province of the courts to review erroneous

legal conclusions of the Interstate Commerce Commission or the "soundness of the reasoning by which its conclusions were reached."

The majority opinion also raises an important question of federal law which has not been, but should be, settled by this Court. The Commission denied relief to a shipper discriminated against by an interstate rail carrier with the statement that the injured shipper had not established that it was in competition with shippers favored by the carrier. Until or unless the majority opinion of the Court of Appeals is rejected this decision of the Commission will stand as law and will require every claimant before the Commission who has been discriminated against to show a competitive situation before obtaining relief.

Nowhere have we been able to find authority to support this proposition, and neither could Judge Solomon of the District Court, who stated:

> "Nothing in the Act and no decision that I have been able to find permits discrimination as between shippers merely because they are not in the same type of business and therefore do not compete against each other." (R. 68; App. 55)

nor could Judge Pope, who stated:

> "The reason the trial court was unable to find a decision that permits discrimination as between shippers merely because they are not in the same type of business and do not compete against each other, is in my opinion due primarily to the fact that such a rule as here urged by the Commission has never occurred to any court." (R. 865; App. 26)

The decision which affirms a finding and conclusion of the Commission, to the effect that a shipper, who

has been refused cars or has been discriminated against in car service by a common carrier, must establish, in order to obtain redress, that he is in competition with the favored shippers and that it was his competitors who were unduly preferred, also raises an important question of federal law which has not been, but should be, settled by this Court.

CONCLUSION

This case presents questions of federal law of general importance. The decision below effects a drastic departure from principles declared by this Court in the Florida East Coast Line case and the B. & O. R. Co. case, supra. It has created a direct conflict with decisions of another circuit which should be resolved by this Court. It has substantially limited the provisions of the Interstate Commerce Act prohibiting undue and unlawful discriminations among shippers. It vitally affects every shipper of goods in interstate commerce by railroad, unless perchance such shipper is engaged in a competing business with another shipper on the lines of the railroad. It is respectfully submitted that the petition for a writ of certiorari should be granted.

GEORGE L. QUINN, JR.,
815 15th St. N.W.,
Washington 5, D. C.,

DONALD A. SCHAFER,
IRVING RAND,
Public Service Building,
Portland 4, Oregon,

Attorneys for Petitioner.

APPENDIX

OPINIONS OF THE COURT OF APPEALS

BEFORE: HEALY, POPE, and CHAMBERS, Circuit Judges

HEALY, Circuit Judge

In October of 1947 appellee, hereafter generally called Martin, filed a complaint with the Interstate Commerce Commission alleging that during the period January 1 to September 30, 1947, the Southern Pacific Company failed in its duty to provide and furnish complainant with an adequate supply of box cars for the transportation of its manufactured products from its Oakland, Oregon plant to interstate destinations, in violation of §1(4) and (11) and §3(1) of the Interstate Commerce Act, 49 USCA §1(4) and (11) and §3(1).[1] The relief asked was that the Commission enter an order commanding Southern Pacific to provide Martin with adequate and equal car service from Oakland, Oregon, to various destinations, and to

---

[1]Section 1(4) in material part provides: "It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, . . ."

Section 1(11) provides: "It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful."

Section 3(1) makes it unlawful for any carrier to make or give any undue or unreasonable preference or advantage to any particular person, firm, locality, region, district, or territory; or to subject any of such concerns or territories, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

pay Martin a sum in excess of two million dollars by way of damages. Southern Pacific intervened and in its answer denied the material allegations of the complaint.

The matter was assigned for formal hearings before an examiner for the Commission. Following such hearings the examiner made a proposed report recommending that the Commission find that Southern Pacific failed in its duty to furnish adequate car service to Martin and that damages be awarded the latter in the amount of approximately $135,000 for such failure.[2] Exceptions to the examiner's report were taken by Martin and Southern Pacific, and after argument Division 3 of the Commission made the report and order here under attack. In its report the Commission, under the heading "Conclusions," made, among others, the following ultimate finding: "We find that complainant has failed to establish that [Southern Pacific] during the complaint period engaged in any unreasonable or otherwise unlawful prac-

---

[2]The finding proposed by the examiner was in response to the claim of violation of the statute requiring rail carriers to furnish cars "on reasonable request." No finding was recommended that the railroad had subjected the complainant to undue prejudice in contravention of Section 3 of the Act.

We may note here that the examiner's recommendations were not binding on the Commission. See Radio Commission v. Nelson Bros. Co., 289 U.S. 266, 285-286, where the Court said: "Complaint is also made that the Commission did not adopt the recommendations of its examiner. But the Commission had the responsibility of decision and was not only at liberty but was required to reach its own conclusions upon the evidence." While this nolding had to do with action of the Radio Commission, we have found in the authorities no indication that the same principle is not applicable to holdings of the Interstate Commerce Commission. See Inter-City Transp. Co. v. United States, 89 F. Supp. 441, 445, where the same principle was applied to a decision of the Interstate Commerce Commission, the court citing *Nelson Bros. Co.*, supra.

tice, as alleged, in violation of section 1 of the act in furnishing or not furnishing cars to complainant, . . . or that [Southern Pacific] subjected complainant to any undue prejudice in violation of section 3." The complaint was ordered dismissed.[3] Martin petitioned for reconsideration and its petition was denied by the entire Commission by unanimous vote of its membership.

Martin then filed a complaint in the court below naming the Commission and the United States as defendants. The complaint asked that the Commission's order be set aside as invalid for a variety of reasons. One of these was that the order lacks a rational basis because the findings do not support the Commission's conclusions. Another was that the Commission's findings of fact show that Martin was damaged and is entitled to reparation, and that such findings support no other conclusion. Other reasons assigned were that the Commission misapplied the law and that its action was arbitrary and capricious. The court was asked to enjoin and set aside the order and to remand the case to the Commission with directions to award such damages as the court shall find Martin to be entitled to. Southern Pacific again intervened. On the basis of the record before the Commission the court made findings of fact and conclusions of law to the effect that the Commission's report and order are not supported by substantial evidence. Judgment was entered vacating the order and remanding the cause to the Commission with directions to take further action not inconsistent with the court's decision. The matter is before us on appeal from the judgment.

---

[3]Martin Bros. Box Co. v. Southern Pacific, 280 I.C.C. 395.

Preliminary to discussion of the case it is well to notice the narrow scope of judicial review of the Commission's orders. It is a long-established principle that such orders are not to be set aside by a court if they are within the Commission's statutory power and are supported by substantial evidence. Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S. 541, 547. To consider the weight of the evidence before the Commission, or the soundness of the reasoning by which its conclusions were reached, is beyond the province of the courts. Virginian Ry. Co. v. United States, 272 U. S. 658, 663. The courts have historically ascribed to the findings of the Commission "the strength due to the judgments of a tribunal appointed by law and informed by experience." Ill. Central R. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 454. It must not be forgotten that the reviewing court was here confronted with transportation problems involving many factors and calling for the exercise of informed administrative judgment. As was observed by the Supreme Court in a case involving rates, "The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems." Board of Trade v. United States, 314 U. S. 534, 546.

It appears from the trial court's decision that it regarded the conclusions of the Commission, quoted above, as conclusions of law rather than as findings of ultimate

fact.[4] Such approach is erroneous. The courts have repeatedly pointed out that whether given rates or practices are "reasonable" or "unduly prejudicial" are factual determinations confided by Congress to the judgment and discretion of the Commission. That this must be so is manifest since the sections of the Act involved contain no definition of what is reasonable or unreasonable or what constitutes undue prejudice. We quote from or summarize a few of the decisions. In Virginian Ry. Co. v. United States, supra, p. 665, it was held: "The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal 'informed by experience.'" In Nashville Ry. v. Tennessee, 262 U. S. 318, 322, it was said: "Whether a preference or discrimination is undue, unreasonable or unjust is ordinarily left to the Commission for decision; and the determination is to be made, as a question of fact, on the matters proved in the particular case." And in Swayne & Hoyt v. United States, 300 U. S. 297, 304, the Court said that whether a discrimination in rates or services is undue or unreasonable has always been regarded as peculiarly a question committed to the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic. Cf. also Johnston Seed Co. v. United States, CA 10, 191 F. 2d 228.

---

[4]In its opinion the court said: "I previously indicated that the court is charged with the duty of determining whether there is a rational basis for the Commission's conclusions. Or, stated differently, whether the Commission's conclusions are supported by substantial evidence, considering the whole record. . . ."

While it is true that under the heading denominated "Conclusions" in its report the Commission stated conclusions of law, it also made factual conclusions and ultimate findings under the same heading.

In its report the Commission took notice of background conditions prevailing during the complaint period, saying:

> "After the close of World War II, the Nation as a whole experienced a great industrial development, and during 1947 the Nation's railroads experienced for the first time since 1920, except in the war period, an average daily shortage of cars. . . . During 1947 the national daily shortage was 18,672 cars, and the defendant was individually faced with an average daily shortage of 583 cars of the types used for the transportation of forest products. Because of the sizeable surplus experienced prior to World War II, the Nation's railroads, including the defendant, did not anticipate the unusual demand for cars that arose in 1947.
>
> "In addition to the increases in general traffic on the defendant's lines during and after World War II, it also experienced a tremendous increase in forest products traffic. . . . The defendant is the principal carrier in Oregon, and the number of cars loaded with forest products on its Portland division increased from 80,675 in 1939 to 162,418 in 1947.
>
> "Another factor affecting the defendant's car supply in 1947 was a reversal of the main traffic flow over its lines after the war. During the war the main flow was westward, but with the close of hostilities in the Pacific theater, the main flow became eastward. During 1947 the defendant originated and delivered to its connecting carriers many more loaded cars than it received from such connections. During the war and postwar periods it exerted extensive efforts to conserve and increase its facilities. On these facts the defendant cannot be held accountable for general car shortages on its lines within the period covered by this complaint."

This resume of conditions has support in the record, and indeed, in many of its aspects, in common knowledge. In

such circumstances it was inevitable that carriers would be faced with complaints by shippers, and the record shows that during the period in question Southern Pacific received thousands of such complaints.

The Commission impartially and at great length summarized the evidence adduced both by the complaining party and by the carrier. In no particular do we discover in the summary a distortion of the record made before the examiner.[5] While much of the summary recites evidence on Martin's part which would support a ruling in its favor, the resume of the carrier's showing points substantially in the opposite direction. For example, we quote a portion of the report:

"In support of its contention that cars were distributed to the complainant on a reasonable basis, the defendant showed that during the period concerned the complainant received more cars than it requested by written car orders,[6] whereas other shippers on its lines,

---

[5]There is substantial testimony in the record to the effect that during the complaint period information given to Southern Pacific by Martin's employees as to the need for cars was conflicting, and that the road's representative told Martin's sales representative that it was essential for the shipper to place definite car orders so as to remove the confusion as to its needs. The testimony is in conflict as to the number of cars required by Martin from day to day. It was shown to be the practice of Southern Pacific to furnish cars to the shippers of lumber in Oregon, including Martin, when clear and definite orders for placing were received. It appears from the testimony of the carrier's witnesses that the road did not require that written orders for cars be placed, and that oral orders were honored when clear and definite as to Martin's daily need. Evidence for the carrier discloses that when shippers submitted oral orders, by telephone or otherwise, it was the practice of the carrier's agents to reduce them to writing on printed order forms. Pads of these forms were supplied all shippers. Also, there was a substantial showing that during the emergency the carrier endeavored to pro rate cars between shippers of lumber so that there might be an equitable distribution of the available supply.

[6]See footnote 5.

including the Portland division, were furnished on the average only 80 per cent of the cars ordered by them. From January 1 to June 30, 1947, cars were furnished to the complainant in practically complete compliance with written car orders, and in the remainder of the period more cars than ordered were furnished, but some delay was encountered. In the latter period, the distribution of cars to shippers on the Portland division, including the complainant, was made on a percentage-of-quota basis; that is, if the available car supply on a particular day was only 50 per cent of the aggregate capacity of the district, each shipper was assigned only 50 per cent of its quota, except that no cars would be assigned to a shipper which had no orders on file. During the first 6 months of the complaint period, the car shortage was not as severe as during the later period; but some shortage did exist, and cars were allegedly distributed to each shipper in proportion to the number of empty cars available."

Later in the summary attention was called to evidence in the record that a number of cars were kept on hand upon the complainant's siding for several days during much of the complaint period. One car was on hand 7 days, two were on hand 6 days, eleven were on hand on 5 days, twenty-two on hand on 4 days, and fifty-six on hand on 3 days. The Commission thought that these facts were relevant in consideration of the complainant's ability to load cars in addition to those which were furnished.

In its conclusions the Commission stated: "The evidence establishes that from January 1 to June 30, 1947,

complainant received practically all of the cars for which specific written car orders were placed; that thereafter in the complaint period more cars were furnished than were requested by written orders, though some delays were experienced; that complainant desired, required, and attempted to secure additional cars from defendant; that defendant and its employees made reasonable, and sometimes successful, efforts to furnish additional cars to complainant; that by reason of its inability to secure cars at all times when needed complainant was unable to fill some orders placed with it; that during 1947 defendant suffered a daily shortage of 583 freight cars; that such shortage was a general one for which no direct responsibility can be placed upon defendant; *and that it is not shown that defendant unduly favored shippers other than complainant.*" [Emphasis ours.]

In disposing of the shipper's complaint the Commission said: "Complainant alleges violations of section 1(4), section 1(11) and section 3(1) of the Interstate Commerce Act. Under those sections defendant is required, in part, to provide and furnish transportation upon reasonable request; to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and not to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, locality, or territory. The right of a shipper to cars, however, is not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made and which it could

not reasonably have been expected to meet in full. The law exacts only what is reasonable from such carriers, but at the same time requires that they should be equally reasonable in the treatment of their patrons. In case of car shortage occasioned by unexpected demands, they are bound to treat shippers fairly, if not identically. [Citing authorities.] Considering the above, in the light of the facts of this record, we conclude that complainant has failed to establish any violation of sections 1 and 3 as alleged."[7]

The Commission analyzed in detail the shipper's showing with respect to damages claimed to have been sustained by reason of a shortage of cars at shipper's Oakland, Oregon, plant. It observed that the shipper's computations were made for the entire year, and that "no method is indicated for arriving at a reasonable estimate for the complaint period. They are based to a great extent upon the operation of the complainant's corrugated-box plant at Aurora, which was in no way affected during the complaint period by the situation at Oakland." Further, the Commission held inapposite certain comparisons made by the shipper with prior years. In its conclusions on this point the Commission found that

---

[7]An argument is advanced that the Commission misinterpreted the requirements of section 3(1) of the Interstate Commerce Act, in that it is said to have believed there could be no violation of the section unless undue preference was extended to *competitors* of the complaining shipper. The Commission's report and findings afford no basis for the argument.

In this connection it is significant to recall that even the much relied upon report of the examiner did not recommend a finding that the carrier had subjected the complainant to undue prejudice in contravention of section 3 of the Act. See footnote 2 above.

"the evidence presented falls far short of the requirements in a proceeding of this character to support an award of reparation. Where special damages are sought, the proof thereof must be as definite and certain as would be necessary under established principles of law to support a judgment in court." [Citing previous decisions.]

A majority of the court are of opinion that the shipper's proof of damages was sufficiently specific to have supported an award in some amount had the Commission held in favor of the shipper on the issue of statutory violation. Accordingly our decision is predicated on grounds other than that developed in the preceding paragraph.

The judgment of the district court is reversed.

CHAMBERS, Circuit Judge, concurring:

The examiner of the Interstate Commerce Commission who held hearings on the complaint of Martin Brothers Box Company found an unfair discrimination by Southern Pacific Company. He recommended substantial damages or reparation. If I thought the district court and this court had the same latitude with respect to reviewing an order of the Interstate Commerce Commission that the Commission has in following or rejecting a recommendation of the examiner, then I would vote to uphold the examiner.

But on the ground that under the record *the Commission* was not clearly wrong in finding there was no undue discrimination under the circumstances of the case, I concur in the result reached by Judge Healy. If the

Commission had found there was undue discrimination but that under the evidence it could not fix damages, then I would join Judge Pope.

There is evidence here of substantial damage caused by the car shortage. If Southern Pacific is legally responsible, then the Commission should come up with a reasonable figure for this damage, and an intelligent estimate would be satisfactory.

POPE, Circuit Judge, dissenting:

Judge Healy's opinion cites many of the leading decisions of the Supreme Court noting the narrow scope of judicial review of the Commission's orders. It quotes at considerable length the authorities referring to the deference due the findings of a tribunal "informed by experience". But unfortunately for the right of the matter here, those impeccable authorities have no application to the facts of this case. This is not the kind of case to which the language quoted from the Supreme Court is addressed. On the contrary, this is a case in which all of the evidence, both that of the complainant and that of the carrier, shows with certainty that there was an unlawful preference and unreasonable prejudice and disadvantage to the complainant within the meaning of the Act. There was no evidence whatever to the contrary. Furthermore, the Commission's failure to take account of this, the fact that it ignored it, is explained by the Commission's demonstrable mistake of law in wholly disregarding statutory standards. But above and beyond the fact that the decision here disregards the rights of the shipper involved, I think it can be demonstrated, as

I propose to do, that if this decision stands the railroads can proceed, wholly without hindrance from the Commission, so to pick and choose among shippers that they will, in many instances, be exercising the power to say which industries shall live and which shall die. What has happened here appears to me to be an unthinkable abnegation of its duties by the Commission.

I think it is important to note here that certain allegations of the complaint before the Commission were not disputed by the defendant company and that upon those issues the findings of the Commission support the complaint. Thus there is no question here that the complainant desired, required and attempted to procure more cars than it got. The report of the Commission recites: "The complainant indicated generally that it wanted more cars than were furnished and this is admitted by the Oakland agent of the defendant." Among the conclusions of the Commission was one that: "Complainant desired, required and attempted to secure additional cars from defendant." Nor is there any question here but that complainant made "reasonable request" therefor within the meaning of §1(4) of the Act, (49 U.S.C.A. §1(4)). There is no finding that such request was not made.

In my view the heart of this case relates to agency action which is arbitrary, capricious and an abuse of discretion because it is in disregard of undisputed and indisputable evidence; because it has no rational basis; and because it proceeds upon a misapprehension of the applicable sections of the Act and hence it is not in accordance with law. If I am right in these views as to where

the Commission disregarded the facts, and as to how it misinterpreted the law, there can be no doubt as to the authority of the reviewing court to set the agency action aside. 5 U.S.C.A. §1009(e).

As the prevailing opinion discloses, the complaint was based in part upon an alleged violation of §3(1) of the Act which recites that it shall be unlawful for a carrier "to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, . . . in any respect whatsoever; or to subject any particular person, company, firm . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." I think that not only the evidence of the complainant but that of the carrier as well, shows an unlawful preference and unreasonable prejudice or disadvantage within the meaning of the Act.[1] It is true that in its conclusions the Commission recited: "That it is

---

[1]Footnotes 2 and 7 of Judge Healy's opinion suggest that the examiner did not recommend a finding that the railroad had subjected the complainant to undue prejudice in violation of section 3. Exactly the contrary is the case. The examiner recited the tabulations showing that six shippers at Portland, Eugene and Salem (served by competing carriers) "encountered little delay in receiving cars", while complainant's plant, during the same period, encountered "a considerable amount of delay". He cited the large lumber company at Portland that ordered cars by phone "and experienced no difficulty in obtaining cars." He pointed out, as I do hereafter, (note 5, infra), that the carrier's distribution to complainant on the basis of percentage of written orders filed was irrational under the circumstances, and calculated to discriminate, and he concluded that "complainant did not receive its fair share of the cars available . . . and that defendant should have furnished to complainant about 80 percent of its requirements, the percentage figure that it admits were furnished on the average to other shippers on its lines during this period." It was this discrimination, resulting in complainant's not getting "its fair share", upon which the examiner's recommendation of reparation was based.

not shown that defendant unduly favored shippers other than complainant," but I think that the trial court correctly held and found that the Commission in reaching that conclusion rode too hard upon the word 'unduly' and based such conclusion not upon any findings of fact but upon a misreading and misinterpretation of the statutory provision just alluded to.

The Commission recited at considerable length the testimony given by one of the complainant's salesmen who stopped taking orders and at different intervals was permitted to go to Oakland to aid in an attempt to obtain more cars for the complainant. It is obvious that the Commission fully credited his testimony for it made what this witness said a part of its findings: "He made trips to Medford, Oreg., and called on the defendant's division freight and passenger agent who agreed to do all he could to afford relief. He also called on the defendant's freight traffic manager at Portland and discussed the situation. In one discussion with that official he was informed that the complainant's fixed freight-car quota was only 5 cars a day, or the same as that assigned to the former owner of the Oakland mill. He was later told that the quota would be changed to 10 cars a day, but that because of the car shortage there was doubt that the complainant could be given more than 50 per cent of its quota."

The Commission's report recited at length the history of the complainant's purchase of the Oakland mill and of how the facilities of that mill were enlarged and improved and its output multiplied. The Commission's findings show that these plans for enlarging the mill and the

increase of the freight car requirements to 13 cars per day were discussed with its officers there before the complainant exercised its options to buy the mill. The findings of the Commission in the quotation last made in which quotas are referred to, are necessarily a recognition that a "quota" of five cars a day, the same as that assigned to the former owner of the mill, would have no relation whatever to the reasonable requirements of complainant.[2] At any rate it must be taken that complain-

---

[2]The Commission properly makes no allusion to a claim by the carrier that the complainant's requests for cars were conflicting or uncertain. (This is the matter referred to in the court's footnote 5 to which I shall refer later.) The record discloses that the carrier had written notice of complainant's requirements. Defendant's Exhibit 12 is a file of letters and telegrams received from the complainant including two letters dated July 30, 1946, one sent to the defendant at San Francisco and the other at Los Angeles, in which the carrier was advised that the complainant had a minimum requirement of 36 empty cars per week. In one of these letters complainant stated also: "Unless we can secure quick relief from your good company, we will be required to shut down the plant until something can be worked out for us. Some twenty to twenty-five carloads of manufactured material, including shook for perishables and housing lumber, are on our dock at Oakland, Oregon, awaiting cars, and literally have choked off additional production until we get cars." On August 6, 1946, the carrier was advised that although for the long pull more would be required: "Our minimum requirements, in order to keep our plant running at a minimum, we require not less than 150 cars per month." The same file contains copies of telegrams and letters from complainant from as early as August 30, 1946, to as late as September 26, 1947, requesting in terms of desperation that it be furnished more cars. In view of these written requests, neither of which was ever complied with, the defendant cannot have been in doubt as to what was requested. No doubt if the calculation were carried out to 3 or 4 decimal points there would be some difference between 36 cars per week and 150 cars per month, so that viewed thus microscopically these two sets of written requests could be called "conflicting". At 5 days per week or 21 days per month, whichever it be, the amount is 7 plus cars per day. Nelson, the defendant's freight traffic manager who made an effort to testify to conflicting orders, not only demonstrated his inability to make this simple mathematical calculation

ant's requirements were at least seven cars a day; nor is there any finding inconsistent therewith.

The majority opinion in my view misinterprets the Commission's report. Thus a little more than half way through the opinion it is stated: "For example we quote a portion of the report: . . ." Then follows a paragraph copied and quoted from the report. The opinion gives the impression that this paragraph thus quoted out of context was what the Commission found. It was no such thing. It was a mere recital by the Commission of what defendant argued. This is not only plain from the use of the word "allegedly" which appears in the next to the last line, but it is clearly evident from the text of the report.

The Commission made its own findings with respect to these written car orders referred to in the quoted argument. After explaining how those orders were made up,—that the complainant's employee would go to the carrier's local agent and after telephoning the defendant's office at Eugene to find out how many cars had been assigned to

---

but based his testimony as to the divergent orders on what some other employee of the defendant told him. This simple hearsay relating to conversations with other company employees was not only disregarded by the Commission but obviously it furnished no excuse for a failure to determine that complainant was requesting not less than 7 cars per day.

The Commission's report sufficiently discloses that complainant's needs were at least equal to its requests. The report refers to the estimate of complainant's president that its production capacity was 8.4 carloads per day. The Commission found that throughout the period here in question "complainant had orders that were sufficient for operation of the Oakland plant at capacity during this period." It then proceeded to recite the lengths to which complainant had to go by reason of its inability to operate at capacity, its resorting to deliveries by truck, its cancelling of orders, and its having to turn to other products.

complainant that day, he would then make out the written orders for the cars thus assigned, the Commission proceeds: "The complainant indicated generally that it wanted more cars than were furnished and this is admitted by the Oakland agent of the defendant. It appears that the written car order blanks, which were filled out and given to the defendant's agent after the complainant knew what cars had been assigned to it for the particular day, were to a large extent nothing more than a written confirmation, for the defendant's records, that the complainant wanted the cars that had been assigned to it for that day."

Thus the Commission found, as did the trial judge, that the written car orders placed by the complainant with the defendant were no indication of the number of cars required. To try to read the paragraph quoted in the majority opinion as representing some finding of the Commission, would be to convict the Commission of a meaningless play on words. The statement in the quoted paragraph that "during the period concerned the complainant received more cars than it requested by written car orders", is wholly irrelevant in view of the Commission's finding that the written car orders were made out in the manner described by the Commission and had no relation to the complainant's request or requirements.[3]

---

[3]There can be no doubt but that the Commission understood this language quoted in the majority opinion as being but a recital of what the defendant argued and nothing more for it copied that paragraph from the report of the examiner whose general findings were in favor of the complainant. The Commission must have understood the examiner in framing this paragraph to be making a mere recital of a party's contention and must have included it in its report with like intent.

There is no evidence whatever that the Commission accepted this irrational suggestion that it was important that complainant received more cars than those listed in the written orders.

There is much more evidence that the Commission credited and accepted the testimony of a witness whom it described as "a person with considerable transportation experience". Its summary of this witness' tabulations of the records of car orders and deliveries and of his testimony generally was copied in the report verbatim from the recommended report of the examiner. The Commission refers to this person's testimony to the effect that the delay in filling car orders occurred at non-competitive points such as Oakland, Oregon, where complainant's mill was located. The Commission refers to his tabulation taken from the defendant's car order records relating to orders and deliveries to three shippers at Eugene, two at Portland, and one at Salem, during July, August and September, 1947, the period when the greatest delay occurred in respect to complainant's car orders. It is recited with respect to the complainant that "from July to September, inclusive, a considerable amount of delay in receiving cars was encountered. They (the tabulations) also indicated that the six shippers encountered little delay in receiving cars during the period covered . . . During and prior to the complaint period, this witness was traffic manager of a large lumber company with its main plant at Portland. That company ordered its cars by phone and experienced no difficulty in obtaining cars from the defendant during 1947."

It is plain that the examiner who heard this and the other witnesses in person, credited that testimony fully for he found that "during the period from January to September inclusive, complainant did not receive its fair share of the cars available." But without suggesting that this witness of whose capacity and extensive research the Commission speaks so highly, was one whom the Commission was obliged to believe and credit, yet it is apparent that the statistics and records furnished by the defendant itself compelled a conclusion that the facts were in accord with what this witness discovered.

The trial judge in his findings shows that even before the period of greatest shortage in July, August, and September, the plaintiff was already receiving the short end of the stick. Taking his figures from the defendant's exhibits, he shows that for the month of April, 1947, when there was "a slight box car shortage" for one week and no shortage for two other weeks, and when users generally on the Portland division were furnished 92% of the box cars ordered, the plaintiff received only 40 such cars. Assuming a 21 day month and a requirement and request of seven cars per day, this means that even in April complainant was receiving only 40/147 of its needs or slightly more than 27% against the 92% furnished car users in the aggregate. The trial court showed from the same exhibits of the defendant that in the month of May, when there was no shortage of box cars, plaintiff received 54 cars or 54/147 or 36% of its assumed requirements.

The real question, however, is how did plaintiff fare in July, August and September? Defendant's exhibit 31

shows that upon its Portland division taken as a whole it supplied 77% of the cars ordered in the month of July. Its exhibit 41 shows that in that month complainant received a total of 62 cars,[4] or less than 50% of its requested requirements. In the month of August the same exhibits make an overall showing that 65% of all cars ordered were furnished generally, while complainant got a total of 58 or slightly less than 40% of its requirements. For September the figures are 58% furnished overall and 58 cars or 40% supplied to the complainant.

I do not think that the Commission overlooked this evidence of discrepancies. Nor was the evidence of the witness mentioned, or his tabulations challenged by the carrier.[5] The Commission's report shows on its face that

---

[4]In referring to the number of cars, as in the opinion of the trial court and in that of the Commission, numbers given are the "adjusted" totals. Some of the cars furnished were refrigerator cars in place of box cars. As these cars lacked the capacity of box cars, two or three refrigerator cars were counted as the equivalent of one box car depending upon the size of the box car ordered. This was in accordance with a service order of the Commission which recognized this ratio. The totals arrived at in this manner were referred to as the "adjusted" totals.

[5]As pointed out by the trial judge in part No. VI of his opinion and findings, an attempt was made by a witness for the carrier, the chief clerk of its division superintendent, to show that during the period in question the carrier put into effect a distribution or rationing rule based upon the production capacity of its shippers in the lumber industry whereby each would get its proportionate share of the total cars available. But as the court there notes, the system was completely nullified because the witness disclosed the carrier was proceeding upon the theory that its obligation was limited with respect to the complainant and the other shippers by the number of written car orders on file. This witness testified as quoted by the trial court: "We would take into consideration the car orders that were filed by the mill." He also said: "Q. Would you furnish to the mill cars if there were no car orders on file? A. No sir." As above indicated, the presence or absence of written car orders

it simply ignored and disregarded these undisputed facts because of a fundamental error on the part of the Commission as to the meaning of the Act. The report states: "In rebuttal of evidence in behalf of the complainant purporting to indicate that shippers at Portland, Eugene, and other terminals in general received better service than did the complainant, the defendant points out that the *complainant has not shown that it is in competition with any shipper at such points,* and that conditions and circumstances affecting the promptness of car supply at terminals are such as necessarily give shippers there located a natural advantage over shippers at nonterminal points. At terminals the yard engines are usually employed on a 24 hour basis and there is generally an influx of loads to the terminals which produce empty cars. The complainant has not established *that any of its competitors* was unduly preferred by the practices of the defendant here assailed." (Emphasis supplied)

The last sentence quoted is the Commission's finding. Its significance in the case is made clear by the position taken by the Commission in its brief filed in this court which states: "The record also fails to show that appellee was subjected to competition since it produced only wire-bound boxes and was not engaged in the sale of lumber as such. In the absence of proof of competition an allegation of undue prejudice and preference cannot be sus-

---

were without significance with respect to the complainant's requirements or requests. A distribution or rationing system of the kind described by this witness which proceeded upon the theory that allocation or distribution must be based upon or measured by the number of orders on file would naturally result in this case in the discrimination which the defendant's records disclose.

tained." I think that this is the clue to the otherwise unexplained action of the Commission in ignoring the undisputed evidence of discrimination. With respect to this the trial judge said: "Nothing in the Act and no decision that I have been able to find permits discrimination as between shippers merely because they are not in the same type of business and therefore do not compete against each other."

It is clear upon both reason and authority that the trial judge was right in this statement of the law, and because the record compels the conclusion that the Commission here proceeded upon the same misapprehension of the law and the meaning of the Act which is quoted above from the Commission's brief, I am of the opinion that the trial judge was right in setting aside the Commission's order.

Of course under the doctrine pronounced in the cases, some of which are cited in the majority opinion relating to the scope of judicial review of the Commission's orders, the finding of the Commission upon the question of whether or not there exists in a given case "undue or unreasonable preference or advantage" will not be disturbed upon court review so long as there is "warrant in the record" and a "rational basis for the Commission's conclusions". But such rule cannot be applied where there has been a disregard of statutory standards. Central R.R. Co. v. United States, 257 U.S. 247. In such a case, or where, as here, the order was rendered without any evidence whatever to support it, "the consideration of such a question involves not an issue of fact, but one of

law which it is the duty of the courts to examine and decide." Florida East Coast Line v. U. S., 234 U.S. 167, 185.

I think it is elementary that upon a review such as this, the Commission's decision must be supported by sufficient findings and an adequate record. Even if there were doubt as to whether the Commission was proceeding upon the theory that the complainant must be denied relief in the absence of proof of competition, yet the very existence of the doubt would alone and without more require a reversal of its order *because of the inadequacy and lack of clarity of the record*. See Eastern-Central Assn. v. U. S., 321 U.S. 194, 210; U. S. vs. Chicago, M., St. P. & P. R. Co., 294 U.S. 499, 511.

Notwithstanding the judge, in the language quoted, challenged the appellants here to find something in the Act and some decision which he said he had not been able to find which permits discrimination as between shippers because they do not compete, the appellants have not undertaken here to cite the decision of any court to such effect.[6]

---

[6]The only authority cited to support the above quoted statement from the Commission's brief are three decisions of the Commission: Americus & Co. v. Pennsylvania R.R. Co., 181 I.C.C. 5, 10; California Cotton Oil Corp. v. Atchison, T. & S. F. Ry Co., 218 I.C.C. 97, 105; Traffic Bureau, Lynchburg Cham. of Com. v. C. & O. Ry. Co., 234 I.C.C. 765, 768. None of the cases cited have any bearing upon the point here discussed. The last cited case involved a complaint that rates on carload shipments of sugar from Baltimore, Maryland, to Lynchburg, Va., were unreasonable when compared with rates on the same commodity from Baltimore to Richmond and Charlottesville. Not only was the allegation of unjust discrimination withdrawn at the hearing but the dismissal of the complaint was based upon a finding of motor truck and water

According to the position taken by the Commission the carrier could with propriety say to Martin Brothers: "You are the only manufacturer of wire bound boxes shipping over our line and since you have no competitors we will give you just as many cars as we please;" or, (as complainant's president testified it did say) "You cannot expect us to take cars from other shippers with a good pay-bottom load and give them to you for wire bound boxes."[7]

Of course it is well established that in certain cases involving transportation service and charges, competitive conditions may justify diversity in services or rates. Barringer & Co. v. United States, 319 U.S. 1, 7. Examples of such cases are where shipments over one line meet no competition and demand higher rates than over another line where that competition exists.[8] But as pointed out in the Barringer case, supra, at page 9, that principle has no application whatever to a case of the kind here pres-

---

competition which affected the rates to Richmond and Charlottesville but which competitive conditions were not present at Lynchburg. The case was therefore one covered by the rule applied in Barringer v. U. S., (infra). The same thing is true of the other two cases cited.

[7]Whether this conversation did or did not take place, the possibility that a carrier might be moved by such considerations discloses a reason why the Commission's attitude toward the necessity of complainant showing favoritism to a competitor is wholly unacceptable. It was surely not the purpose of Congress to put it within the power of a carrier to determine what sort of commerce shall move and what shall not move by furnishing cars to shippers with the more lucrative traffic and refusing cars to shippers with less paying traffic and justifying the discrimination on the ground that the latter are not in competition with the former.

[8]Some of these cases are collected in the footnote to Eastern Central Assn. v. U. S., supra, at p. 202.

ent. The court said: "We have repeatedly sustained a finding of the Commission that such a difference based on a difference in identity of shippers or the ownership of the goods shipped, or on other circumstances *irrelevant to the carrier service rendered* is an unjust discrimination to shippers." (Emphasis added) Thus in Int. Com. Comm. vs. Balt & Ohio R.R., 225 U.S. 326, the alleged unlawful discrimination related to a different rate for the transportation of coal to a given point for the use of railroads than for coal to the same point for other shippers. There, of course, the railroads shipping the railroad fuel-coal were not in competition with the other shippers. It was argued: "The fuel coal thus shipped was not in competition with the commercial coal shipped to the same point." Alluding to this the court said: "But such features do not affect the carriage qualify or alter the essential service, which is to get an article from one place to another. The greater or less inducement to seek the service is not the service. *Such competition, therefore, is as extraneous to the transportation as the instances in the cases cited.*" (Emphasis added)

The reason the trial court was unable to find a decision that permits discrimination as between shippers merely because they are not in the same type of business and do not compete against each other, is in my opinion due primarily to the fact that such a rule as here urged by the Commission has never occurred to any court. Decisions finding an unlawful discrimination in violation of §3(1) have not suggested that a shipper must prove that the persons receiving the favored treatment are his

competitors. Thus in B. & O. R. Co. v. U. S., 305 U.S. 507, the court held that the Commission had properly ordered carriers to refrain from furnishing storage and warehousing to a preferred group of large shippers. While it is true that the result of the railroad's practices was competition between the railroads on the one hand and the owners of other warehouses on the other, yet the vice of the arrangement was held by the court to rise from the discrimination between shippers. The court said at page 524: "Since the carrier warehouse rates, as found by the Court and Commission, are not open to all shippers alike, there is violation of §§2 and 3(1) prohibiting discrimination and unreasonable prejudice."

Obviously it did not occur to the court to make its statement read: "are not open to all *competing* shippers alike". In that case it appears that among the persons favored were distributors of flour. To my mind it would be unthinkable that the discriminations there involved could be upheld if the carriers permitted all distributors of flour, without exception, to have the special warehousing services, just so those denied this privilege were not distributors of flour. In Louisville & N. R. Co. v. U. S., 282 U.S. 740, the practice condemned was the free hauling by carriers of private cars belonging to other carriers. Private cars belonging to other persons and concerns were charged for like services. Although the owners of the cars thus charged were not in competition with the carriers who had the free service, it was not even argued that the lack of competition would justify the discrimination.

The fact that the complainant here was located at a point reached exclusively by the defendant's line, and the favored shippers were, as the witness above mentioned testified, frequently at points reached by competing carriers, cannot as a matter of law justify a discrimination against the complainant. Seaboard Airline Ry. Co. v. U. S. 254 U.S. 57. As the court said in that case: "The principle established in these cases is that the statute aims to establish equality of rights among shippers for carriage under substantially similar circumstances and conditions, and that the exigencies of competition do not justify discrimination against shippers for substantially like services." (p. 62)[9]

The majority opinion, in its footnote 5, refers to certain testimony in the record to the effect that information given by the complainant to the carrier as to cars required was conflicting. See note 2, supra. If this be an effort to supply something which the Commission chose to omit from its report, or, if it be designed to supplement the Commission's findings, I have only to say that it is not a part of the functions of this court to make such findings of fact. For reasons satisfactory to the Commission it concluded, as I have shown, that complainant needed and attempted to secure more cars than it received. As I have suggested above, there is no issue

---

[9]The unreasonableness of any discrimination against shippers at intermediate or non-competitive stations, in favor of those at terminal competitive points, is manifest, for discrimination is expressly prohibited even against shippers on lateral or branch lines by §1 (9) (Title 49 §1 (9)). Cf. United States v. Baltimore & O.R. Co., 4 cir., 165 Fed. 113, 131, (reversed on other grounds, 215 U.S. 481,).

here with respect to the complainant having made a reasonable request within the meaning of the Act. If footnote 5 is designed to show some lack of a reasonable request, it is simply out of order here unless it is to be interpreted as a suggestion to be made to the Commission if the matter is to be remanded for further hearing by that body.

Likewise out of place in the opinion is the reference to some evidence that a number of cars were on certain days kept on hand for an extended period of time. I think that what the trial court said about this reference to the retention of cars is irrefutable. As the trial judge pointed out the Commission itself based no ultimate finding upon these isolated circumstances of detained cars and said that the holding of them was "relevant in a consideration of the complainant's ability to load cars in addition to those which were furnished." But this mere comment of the Commission becomes of no significance in view of the conclusion that the complainant desired and required cars in addition to those which it received. Obviously the Commission had no doubt of the ability to load the cars. Unquestionably this complainant had to lay off entire shifts of employees and had to suspend the activities of its salesmen when its yards became stacked with finished material for which it had no cars. In that sort of picture, evidence that might be relevant to a consideration of complainant's ability to load additional cars becomes too trivial to merit a reference.

Admittedly it is no part of the function of the court below to make findings of fact which would be in dis-

agreement with findings made by the Commission based upon substantial evidence. But here the trial court made its findings by the simple process of adding a column of figures furnished by the carrier,—figures which confirmed the testimony of the complainant's witnesses. The finding was that the complainant received an adjusted total of 593 cars during the complaint period or an average of 3.1 cars for each working day. For the reasons which I have heretofore pointed out, I think that the Commission simply thought this calculation unimportant and irrelevant, and refrained from making any computation for itself because of its interpretation of the Act's requirements as to the treatment due a shipper who happens to be the only shipper on the line shipping a specified product.

As noted in Judge Chamber's opinion, he and I are both agreed that there was substantial evidence of damage. The *reality* of the damage was strikingly demonstrated. A fully equipped box-making plant, with a backlog of orders for 242 carloads of product, was choked down from a three-shift to a one-shift operation for want of cars, its orders were cancelled for inability to make delivery, it had to take its salesmen off the road, and even so was compelled to resort to unsuitable deliveries by truck and to expend large sums to adapt the mill for the production of other products. The *amount* of the claimed loss, when scaled down as it was by the examiner, was not speculative or uncertain, as the trial court points out. If there was any damage it was the duty of the Commission to order reparation. Story Parchment Co. v. Patterson Co., 28 2 U.S. 555, 563; Midland Valley R. Co. v.

Excelsior Coal Co., 8 cir., 86 F. 2d 177, 183.

In my view the judgment of the trial court should be affirmed.

(Endorsed:) Opinion, Concurring Opinion and Dissenting Opinion. Filed Jan. 10, 1955. Paul P. O'Brien, Clerk.

OPINION OF THE DISTRICT COURT

May 15, 1953

Solomon, Judge:

Plaintiff, Martin Brothers Box Company, hereinafter sometimes called "complainant," filed a petition in this court pursuant to 28 USCA 1336 to set aside an order of the Interstate Commerce Commission, hereinafter called the "Commission," dismissing the complaint of the plaintiff in a proceeding brought before the Commission. The United States of America and the Commission have no financial interest in this case but, because of statutory necessity (28 USCA 2322), they were made parties defendant. Southern Pacific Company, the defendant in the proceeding before the Commission and the intervenor herein, shall hereafter be referred to either as "Southern Pacific" or "defendant."

Plaintiff, by complaint filed against Southern Pacific with the Commission on October 14, 1947, alleged that Southern Pacific, during the period from January 1, 1947, to September 30, 1947, failed in its duty to provide and furnish transportation from plaintiff's plant at Oakland, Oregon, upon reasonable request therefor, and failed in its duty to furnish safe and adequate car service at that plant in violation of § 1 (4) and § 1 (11) of the Interstate Commerce Act, hereinafter referred to as the "Act" [49 USCA § 1 (4) and § 1 (11)]. By reason thereof, plaintiff alleged that it was caused undue and unreasonable prejudice and disadvantage in violation of § 3 (1) of said Act. Plaintiff, under § 9 of the Act, requested an award of reparations in the sum of $2,259,000.

A hearing was had on such complaint before an Examiner in Portland, Oregon, and, on September 1, 1950, the Examiner filed his proposed report in which he found defendant had violated its duty to furnish plaintiff adequate car service, and recommended an award of reparations in the amount of $135,220.56, with interest. Exceptions were filed by both plaintiff and Southern Pacific to such report and, following a hearing before its Division 3, the Commission, on March 12, 1951, rendered its decision in which it dismissed plaintiff's complaint. (Martin Brothers Box Co. v. Southern Pacific, 280 I.C.C. 395.)

A petition for reconsideration was denied by the full Commission on June 30, 1951.

Plaintiff, in its petition filed in this court on November 26, 1951, requested a hearing before a 3-judge court and the Southern Pacific, in addition to its general denial, raised the special defense that this court, under § 9 of the Act, lacks jurisdiction to review an order of the Commission denying reparations.

On the authority of United States v. Interstate Commerce Commission, (1949) 337 U. S. 426, the request of plaintiff for a 3-judge court was denied and the special defense of the Southern Pacific was overruled.

There is no substantial dispute between the parties as to the scope of review by this court of the Commission's order. This court, according to United States v. Interstate Commerce Commission, (D. C. Cir. 1951), 198 F. 2d 958, 964, is

> "to apply the standards of judicial review which are generally applicable to administrative action—the standards reflected in the Administrative Pro-

cedure Act, § 1 et seq. 5 U.S.C.A., § 1001 et seq., and in such decisions as Universal Camera Corp. v. N.L.R.B., 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456; United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 489, 62 S. Ct. 722, 86 L. Ed. 971; Gray v. Powell, 314 U. S. 402, 412, 62 S. Ct. 326, 86 L. Ed. 301; Rochester Telephone Corp. v. United States, 307 U.S. 125, 129, 59 S. Ct. 754, 83 L. Ed. 1147; and Chicago Junction Case, 264 U. S. 258, 265, 44 S. Ct. 317, 68 L. Ed. 667."

In other words, this court is limited to determining whether there was a rational basis for the final order of the Commission, and, unless the order is not supported by substantial evidence or is contrary to law, it may not be disturbed.

With this standard in mind, I desire to examine the findings of the Commission. A summary of the facts found by both the Examiner and the Commission follows:

On February 28, 1946, the plaintiff purchased a lumber mill located at Oakland, Oregon, from the A. K. Wilson Lumber Company, primarily to establish a plant for the manufacture of wirebound boxes as well as to supply lumber for its plant located at Toledo, Ohio.

Plaintiff planned to continue the operation of the lumber mill at Oakland and estimated that 5 or 6 cars would be needed each day for the shipment of lumber. This plant had previously been given an allotment of 5 cars a day by Southern Pacific on the basis of the former owner's requirements as a lumber mill. Plaintiff also planned to enlarge and improve the facilities and install machinery for the manufacture of wirebound boxes and to begin production of boxes, with one shift,

about the middle of 1946. It was planned to add a second and, later, a third shift when trained personnel was available. For each shift in the wirebound box department, it was estimated that from 3 to 4 cars would be needed each day for the shipment of boxes, or a total of approximately 13 cars a day.

Before purchasing the Oakland mill, an option thereon and an option on nearby standing timber were obtained. Before exercising its option, plaintiff discussed its plans with defendant's officers and make known its requirements. After receiving defendant's assurances that sufficient freight cars would be furnished to it, plaintiff exercised such options.

By August, 1946, the box-making machinery was installed. However, even earlier, plaintiff established a sales office in Los Angeles and, before any boxes were manufactured, these salesmen booked orders for about 200 carloads of boxes. Because of its inability to obtain sufficient box cars for shipments of lumber to Toledo, the salesmen were instructed to relax their sales efforts. By letters dated July 30 and August 6, 1946, the plaintiff advised the defendant's manager of perishable freight traffic and a district freight agent, both at San Francisco, of its desperate need for cars; that the immediate minimum requirements of the plant were 36 cars per week or 150 cars per month; and that the needs of the plant would shortly be increased to about 250 cars a month. At various times prior to and during the first 9 months of 1947, the plaintiff complained to the defendant that adequate cars were not being received and that additional cars were urgently needed not only to ship lumber to its Toledo plant but also to fill orders of pro-

ducers of perishable commodities which, in turn, urgently needed the containers for shipment of their produce.

One of plaintiff's Los Angeles salesmen, who had been notified to stop taking further orders, came to Oregon, where he spent 1½ months in Oakland during the fall of 1946, and 3 months during the spring of 1947, during which time he exerted all his efforts to obtain more cars. He made telephone calls each morning before 7:45 a.m. to the office of the defendant's local freight agent at Roseburg, Oregon, and went over the switch list with defendant's employees to ascertain how many cars, if any, were to be spotted at the plaintiff's plant that day. On several occasions, on days when no cars were assigned, he induced such employees to reconsider and assign a car for the plaintiff's plant. He made trips to Medford, Oregon, and called on the defendant's division freight and passenger agent, who agreed to do all he could to afford relief. Plaintiff's employee also called on the defendant's freight traffic manager at Portland and discussed the situation with him. In one discussion with that official, he was informed that the plaintiff's fixed freight car quota was only 5 cars a day, the same as that assigned to the former owner of the Oakland mill. He was later told that the quota would be changed to 10 cars a day, but that, because of the car shortage, there was doubt that the plaintiff could be given more than 50 per cent of its quota.

The defendant maintained an agent at Oakland who was in daily contact with the plaintiff's plant and sometimes went there two or three times a day. In addition,

one of plaintiff's employees generally visited defendant's office at Oakland both in the morning and afternoon of each day. While there, he often called the defendant's office at Eugene with respect to the assignment of cars. The defendant's agent at Oakland admitted that he knew plaintiff desired additional cars and that, in response to the latter's requests, he attempted to obtain them through various officials of the defendant.

Plaintiff had orders that were sufficient for operation of the Oakland plant at capacity during the complaint period. It usually operated only one shift. For short periods of time, the plaintiff was required to cease its operations. Plaintiff gave some of its orders to another manuafcturer of boxes and a few orders were delivered by truck. Due to plaintiff's inability to fill orders when needed, many orders were cancelled.

As a result of the inability to obtain lumber from Oakland, the operations of the Toledo, Ohio, plant was curtailed. The Toledo plant was operated with two shifts until March 18, 1947, and with one shift thereafter. About 65 carloads of lumber a month were required to keep each shift running. Most of the lumber was purchased in the open market, but plaintiff was unable to purchase enough in the open market to satisfy the needs of the Toledo plant.

The cars shipped from Oakland to Toledo during the complaint period were as follows:

January	32	June	6
February	47	July	2
March	27	August	6
April	10	September	None
May	12		

Including the cars shipped to Toledo, plaintiff received a total of 593[1] cars during the complaint period.

January	98	June	63
February	78	July	62
March	87	August	58
April	40	September	58
May	54		

The testimony of W. F. Forrest, "a person of considerable transportation experience," who was employed by plaintiff "to make a survey of the other shippers on the defendant's lines concerning their orders and deliveries during the period covered by the complaint," was reviewed. Mr. Forrest traveled 7,752 miles and interviewed the traffic personnel of many shippers at numerous points on the defendant's lines. "He claims to have found evidence of delay in filling car orders only at non-competitive points." He also made a study of defendant's records of plaintiff's written car orders for the whole complaint period and of six other shippers, three of whom were located in Eugene, two in Portland, and one in Salem, for the months of July, August and September, 1947. Solely on the basis of these written car orders, he found that plaintiff promptly received all of the cars which it ordered up to July 1, and that during the remaining three months, plaintiff, but not the other six shippers, encountered a considerable amount of delay in receiving cars.

Mr. Forrest further testified that Timber Structures, Inc., a large Portland lumber company, for whom he

---

[1]In this opinion, as in the Commission's opinion, the number of cars furnished was adjusted to reflect the regulations of a service order of the Commission which permitted the use of two or three refrigerator cars in place of one boxcar, depending upon the size of the boxcar ordered. The 593 cars were delivered as follows:

acted as traffic manager, "ordered its cars by phone and experienced no difficulty in obtaining cars from the defendant during 1947."

There was also introduced in evidence an

> "excerpt from a transcript taken for this Commission on April 30, 1947, at a hearing on an application for a water carrier for additional operating authority. The excerpt submitted consisted of testimony by a representative of the defendant who claimed that it was at that time experiencing no shortage of cars."

The defenses interposed by the defendant were described as follows:

> "The defendant states that its ability to supply cars in 1947 was adversely affected by unusual, unavoidable and unforeseeable conditions resulting from World War II; that at all times during the complaint period it distributed cars to the complainant on a reasonable basis; and that during the complaint period it actually delivered to the complainant more cars than were specifically ordered."

With reference to the defendant's contention that it could not anticipate the unusual demand for cars that arose in 1947, the Commission recited a number of facts on the basis of which it found:

> "On these facts the defendant cannot be held accountable for general car shortages on its lines within the period covered by this complaint."

With reference to the defendant's next contention, the Commission stated:

> "In support of its contention that cars were distributed to the complainant on a reasonable basis, the defendant showed that during the period concerned the complainant received more cars than it requested by written car orders, whereas other shippers on its lines, including the Portland divi-

sion, were furnished on the average only 80 per cent of the cars ordered by them. From January 1 to June 30, 1947, cars were furnished to the complainant in practically complete compliance with written car orders, and in the remainder of the period more cars than ordered were furnished, but some delay was encountered. In the latter period, the distribution of cars to shippers on the Portland division, including the complainant, was made on a percentage-of-quota basis; that is, if the available car supply on a particular day was only 50 per cent of the aggregate capacity of the district, each shipper was assigned only 50 per cent of its quota, except that no cars would be assigned to a shipper which had no orders on file. During the first six months of the complaint period, the car shortage was not as severe as during the later period; but some shortage did exist, and cars were allegedly distributed to each shipper in proportion to the number of empty cars available."

The Commission described the method by which the plaintiff gave orders for cars to the defendant's local agent at Oakland, and then stated:

"Under normal conditions it is the practice for shippers to order the specific number of cars wanted and, therefore, the defendant insists that inasmuch as the complainant received more cars than were specifically ordered, it has no legitimate reason to complain that the distribution of cars made was other than reasonable. The complainant indicated generally that it wanted more cars than were furnished and this is admitted by the Oakland agent of the defendant. It appears that the written car order blanks, which were filled out and given to the defendant's agent after the complainant knew what cars had been assigned to it for the particular day, were to a large extent nothing more than a written confirmation, for the defendant's records, that the complainant wanted the cars that had been assigned to it for that day."

The Commission reviewed the evidence on the claim of the defendant that a number of cars were kept by plaintiff on its siding from 3 to 7 working days during the complaint period. This evidence was introduced to rebut plaintiff's contention that is was not furnished all the cars which it needed. The Commission concluded its discussion by stating:

> "Under emergency conditions such as exist during a period of car shortage, a carrier may be justified in refusing cars to a shipper negligently withholding from shipment cars previously furnished to it. While there is no indication that the defendant's car service practices with respect to the complainant were affected by the holding referred to of cars by the complainant, such holding is relevant in a consideration of the complainant's ability to load cars in addition to those which were furnished."

The Commission then referred to the testimony of the defendant that plaintiff was not in competition with shippers at terminal points and that

> "conditions and circumstances affecting the promptness of car supply at terminals are such as necessarily give shippers there located a natural advantage over shippers at nonterminal points."

This testimony was offered to rebut plaintiff's evidence that shippers at terminal points received better service.

Finally, the Commission reviewed plaintiff's evidence on its claim for damages against the defendant.

Under the heading, "Conclusion," the Commission stated:

> "The evidence establishes that from January 1 to June 30, 1947, complainant received practically all of the cars for which specific written car orders were placed; that thereafter in the complaint period

more cars were furnished than were requested by written orders, though some delays were experienced; that complainant desired, required, and attempted to secure additional cars from defendant; that defendant and its employees made reasonable, and sometimes successful, efforts to furnish additional cars to complainant; that by reason of its inability to secure cars at all times when needed complainant was unable to fill some orders placed with it; that during 1947 defendant suffered a daily shortage of 583 freight cars; that such shortage was a general one for which no direct responsibility can be placed upon defendant; and that it is not shown that defendant unduly favored shippers other than complainant.

"Complainant alleges violations of Section 1 (4), Section 1 (11) and Section 3 (1) of the Interstate Commerce Act. Under those sections defendant is required, in part, to provide and furnish transportation upon reasonable request; to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and not to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, locality, or territory. The right of a shipper to cars, however, it not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made and which it could not reasonably have been expected to meet in full. The law exacts only what is reasonable from such carriers but, at the same time, requires that they should be equally reasonable in the treatment of their patrons. In case of car shortage occasioned by unexpected demands, they are bound to treat shippers fairly, if not identically. Pennsylvania R. Co. vs. Puritan Coal Mining Co., 237 U.S. 121 and Midland Valley R. Co. vs. Barkley, 276 U.S. 482. Considering the above, in the light of the facts of this record, we

conclude that complainant has failed to establish any violation of sections 1 and 3 as alleged. Moreover, the evidence presented falls far short of the requirements in a proceeding of this character to support an award or reparation. Where special damages are sought, the proof thereof must be as definite and certain as would be necessary under established principles of law to support a judgment in court. Lignum-Vitae Products Corp. vs. Alabama G.S.R. Co., 268 I.C.C. 599, 608.

"We find that complainant has failed to establish that defendant during the complaint period engaged in any unreasonable or otherwise unlawful practice, as alleged, in violation of section 1 of the Act in furnishing or not furnishing cars to complainant at Oakland, Oreg., or that defendant subjected complainant to any undue prejudice in violation of section 3. The complaint will be dismissed."

Except for the findings of the Commission above quoted under the heading, "Conclusions," the statement of the evidence and the findings of the Examiner were practically identical to those of the commission. The Examiner recommended an award of reparations and the Commission dismissed plaintiff's complaint.

I previously indicated that the court is charged with the duty of determining whether there is a rational basis for the Commission's conclusions. Or, stated differently, whether the Commission's conclusions are supported by substantial evidence, considering the whole record, and whether, in arriving at those conclusions, it correctly applied the applicable law.

In my opinion, the statement set forth in the second paragraph of the conclusions correctly set forth the rules of law relative to the distribution of cars by a railroad.

A railroad, under §1(4), §1(11) and §3(1) of the Act is required:

1. To furnish transportation upon reasonable request.

2. To establish and enforce reasonable rules with respect to car service.

3. To refrain from causing any undue influence or unreasonable preference or advantage to any particular person, company, locality, or territory.

4. To treat shippers fairly, if not identically, in case of a car shortage.

There remains the question of whether the other conclusions are supported by substantial evidence and are not contrary to law. I will consider each statement in the Commission's conclusions separately

I.

> "The evidence establishes that, from January 1 to June 30, 1947, complainant received practically all of the cars for which specific written car orders were placed; that thereafter in the complaint period more cars were furnished than were requested by written orders, though some delays were experienced."

This statement was based upon the testimony of W. F. Forest, plaintiff's expert, whose testimony was admittedly based upon exhibit 8, which he prepared solely from the written car orders taken from the defendant's files. This statement is relevant only if plaintiff was required to show, as a condition precedent to its right to cars, that it either placed specific written car orders or specific oral car orders for the cars that it desired.

Although the Commission, in such statement referred solely to written car orders, it is relevant to determine whether plaintiff was required to place car orders for a particular number of cars, of a particular type, for delivery to plaintiff on specified days, before the Commission can find that the defendant failed to furnish freight cars upon the "reasonable request" of plaintiff.

The findings of the Commission, heretofore summarized, and the evidence upon which such findings are based, show the continuous requests of plaintiff to secure additional box cars to partially satisfy its urgent need for such cars.

In spite of defendant's knowledge of the needs of plaintiff and its almost daily requests for such cars, defendant contends that such requests do not meet the requirements of specificity demanded by the Act.

In support of this contention, defendant cites:

1. Victor-American Fuel Co. vs. Denver & Salt Lake Railroad Co., 115 I.C.C. 169. (1926.)
2. Winters vs. Chicago-Milwaukee Railroad Co., 87 I.C.C. 113. (1923.)
3. DiGiorgio Importing Co. vs. Pennsylvania Railroad Company, (Md., 1906), 65 Atl. 425.
4. Koepp vs. New Orleans Great Northern Railroad Co., (La., 1926), 110 So. 729.
5. Simmons vs. Seaboard Airline Railroad Co., (Ga., 1909), 66 S. E. 783.
6. 13 Corpus Juris Secundum §37, page 74.
7. 90 American Jurisprudence 630.

The Victor-American and the Winters cases, both of which are Commission decisions, do not even remotely involve the problem before us.

In the DiGiorgio case, plaintiff, a shipper, brought an action against the railroad in the state court for breach of its common law duty to furnish cars. Plaintiff had ordered a specific number of refrigerator cars to ship four boatloads of bananas consigned to it from Jamaica and Cuba. The requisition designated the date of the arrival of the first ship, but did not designate the arrival date of the other three ships. The first ship and one other arrived on the same day and sufficient cars were supplied by the defendant. A few days later, two other ships arrived and the defendant failed to provide a sufficient number of cars to remove the entire cargo. The defendant proved that it had no notice from plaintiff or from any other source, of the approach or expected arrival of the two later ships and a judgment in favor of the defendant was therefore affirmed.

Both the Koepp and the Simmons cases were also actions in state courts under state laws. They involved specific written car orders, but in both cases the carrier was not informed, and had no knowledge, of the type or types of cars required by the shipper. The court in each case found that the shipper required different types of cars for the commodities it manufactured. In the case at bar, the Southern Pacific knew that plaintiff wanted box cars. In fact, Southern Pacific complained that plaintiff always wanted box cars, the type of freight car in greatest demand.

These three state court cases, as well as three other cases are cited in the Corpus Juris Secundum reference to support the text which lays down the requirements of specificity as to the number and character of the cars desired and the time such cars are to be furnished. The other three cases are:

1. Weida vs. Chicago Railroad Co., (Minn., 1898), 75 N. W. 121.
2. Central of Georgia Railroad Co. vs. Rabun, (Ga., 1917), 94 S. E. 598.
3. Stratton vs. Acheson, Topeka & Santa Fe, (Kan., 1925), 236 Pac. 831.

The Weida case involved an interpretation of written car orders placed by a shipper located on a narrow gauge track. He successfully contented that, in accordance with the usual practice, he was entitled to twice the number of cars ordered for the 14-mile trip over the narrow gauge road.

In the Rabun case, plaintiff relied on three written car orders. A judgment in favor of plaintiff was reversed because plaintiff was merely an agent for the shipper and the court held an agent was not entitled to recover a statutory penalty.

The Stratton case involved an action for statutory damages under a state law for the failure to furnish two cars. From a verdict in favor of the plaintiff, the railroad appealed because a state public utility commission regulation required that car orders be in writing and contain information as to the number and type of cars wanted and, in the case of a wheat shipper, the quantity of wheat on hand. Plaintiff, a wheat shipper, had failed to state the quantity of wheat on hand in its order for one of the cars and therefore the judgment of the trial court was reversed as to such car.

None of the cases upon which defendant relies support its contention that plaintiff's request for cars were insufficient because of lack of specificity or that such requests were not reasonable requests within the meaning of the Act.

In my opinion, the portion of the Commission's conclusions relative to written car orders has no bearing on any issue of this case and, if the Commission did premise its dismissal of plaintiff's complaint on this portion of its conclusions, then it is erroneous as being contrary to law.

II.

> "complainant desired, required and attempted to secure additional cars from the defendant;"

The findings of the Commission heretofore summarized relative to the attempts of plaintiff to secure additional freight cars are supported by substantial evidence and form an adequate basis for this conclusion of the Commission.

III.

> "defendant and its employees made reasonable, and sometimes successful, efforts to furnish additional cars to complainant;"

The only evidence to support this conclusion is summarized in the findings of the Commission.

One of plaintiff's Los Angeles salesmen, who had been instructed to refrain from taking further orders, came to Oakland where:

> "He spent 1½ months in Oakland during the fall of 1946 and 3 months during the spring of 1947, during which time he exerted all his efforts to obtaining more cars. He made daily telephone calls each morning before 7:45 a.m., to the office of the defendant's local freight agent at Roseburg, Ore., and went over the switch list of the defendant's employees to ascertain how many cars, if any, were to be spotted at the complainant's plant that day. *On days when no cars were assigned, he on several occasions induced the defendant's employees to re-*

> *consider and assign a car for the complainant's plant.*" (Emphasis added.)

This salesman was told that plaintiff's quota was only 5 cars a day, the same as they assigned to the former owner of the Oakland mill.

> "He was later told that the quota would be changed to 10 cars a day, but that because of the car shortage there was doubt that the complainant could be given more than 50 per cent of its quota. * * *
>
> "The defendant's agent at Oakland admitted that he knew complainant desired additional cars and that in response to latter's requests, he attempted to obtain them for the complainant through various other officials of the defendant."

The other findings of the Commission summarized in this opinion relative to the requirements of the plaintiff, the number of cars which it received, its efforts to secure additional cars, and the number of cars which other shippers on the Portland Division received during the same period, show that there was no substantial evidence to support the Commission's conclusion that defendant "made reasonable and sometimes successful efforts to secure additional cars for the complainant." A "reasonable effort" implies conduct in accordance with the defendant's statutory duty not to prefer "any particular person, company, locality, or territory," and likewise its statutory duty in case of a car shortage to "treat shippers fairly, if not identically."

IV.

> "by reason of its inability to secure cars at all times when needed complainant was unable to fill some orders placed with it;"

The findings of the Commission and the evidence upon which such findings were based amply support this conclusion.

V.

> "during 1947 the defendant suffered a daily shortage of 583 freight cars; that such shortage was a general one for which no direct responsibilty can be placed upon the defendant;"

Here again, the findings of the Commission and the evidence upon which they were based amply support this conclusion.

However, it should be noted that the car shortage was not uniform throughout the entire complaint period. During the months of January and May, and during the first part of June, there was little, if any, shortage of box cars on the Portland Division. During the balance of the period, there were car shortages which varied in intensity. In August and September, the car shortage was most severe.

VI.

> "it is not shown that the defendant unduly favored shippers other than complainant."

The Commission found that other shippers on the Portland Division during the complaint period were furnished on an average of 80[1] per cent of the cars ordered by them. This includes the period beginning July 1, 1947, to September 30, 1947, when the car shortage was more severe and during which period the Southern Pacific adopted and placed in effect a car dis-

[1]This figure is an average of box cars, flats and gondolas. The average for each type of car is: box cars—76%; flats—85% and gondolas—78%.

tribution rule based upon the "production capacity" of its shippers. It is contended that such rule operated to give each shipper its proportionate share of the total cars available.

The witness for defendant who explained the operation of the rule qualified it by stating, "We would take into consideration the car orders that were filed by the mill."

I have previously held that the written car orders placed by plaintiff with the defendant were no indication of the number of cars required, needed, or requested by the plaintiff and that the plaintiff made reasonable requests within the meaning of the Act for all of the freight cars which it required.

The Commission found that, during the complaint period, plaintiff had orders for and could have operated at capacity except for the lack of freight cars; that the plaintiff required 13 freight cars a day to operate at capacity. The Commission also referred to the testimony of one of plaintiff's witnesses who testified that the quota of plaintiff was only 5 cars a day, the same that had been assigned to the former owner who only operated a lumber mill and had no box manufacturing facilities, but that plaintiff's quota would be raised to 10 cars a day.

In view of the productive capacity of plaintiff's lumber and box manufacturing plants at Oakland and the information concerning such operations which were communicated to defendant and of which defendant had personal knowledge, plaintiff was entitled to a quota in excess of 5 cars a day. However, even on the basis of only 5 cars a day, the evidence showed that plaintiff did

not receive it proportionate share of the freight cars as compared to the freight cars received by other shippers.

Plaintiff received an adjusted total of 593 cars during the complaint period or an average of 3.1 cars for each working day. The Commission, in its findings, referred to the testimony of Mr. Forrest, heretofore summarized, who, as a result of his extensive investigations, "claims to have found evidence of delay in filling car orders only at non-competitive points." It also referred to his testimony that Timber Structures, Inc., for whom he acted as traffic manager, "ordered its cars by phone and experienced no difficulty in obtaining cars from defendant during 1947." This testimony was uncontradicted and, in my opinion, is corroborated by the defendant's own evidence.

Defendant's Exhibit 29, is entitled, "Freight Car Shortage—January 1–September 30, 1947, inclusive, Nationally and S. P. Pacific Lines."

Defendant's Exhibit 31 is entitled "Daily Average Cars Ordered and Furnished Portland Division and Pacific Lines 12/29/46 to 10/4/47."

These exhibits show that, even during the periods in which there was little or no shortage of box cars on the Portland Division of the defendant, plaintiff received only a small proportion of the cars which it required.

January

Exhibit 29: During the month of January, there was no shortage of box cars on defendant's lines.

Exhibit 31: 83 per cent of the box cars ordered were furnished.

Plaintiff received 89 box cars and 12 other cars or an adjusted total of 98 cars.

April

Exhibit 29: There was a slight box car shortage for the week ended April 19, and no shortage for the weeks ended April 26 and May 3.

Exhibit 31: From the week ended April 4 to the week ended May 3, 92 per cent of the box cars ordered were furnished.

Plaintiff received 40 box cars.

May

Exhibit 29: No shortage of box cars for the month of May.

Exhibit 31: From the week ended May 10 to the week ended May 31, all box cars ordered were furnished.

Plaintiff received 54 cars, one of which was a flat car.

June

Exhibit 29: For the weeks ended June 7 and June 4, there was no shortage. For the week of June 21, there was a slight shortage and for the week ended June 28, a moderate shortage.

Exhibit 31: From the week ended June 1 to the week ended July 5, 97 per cent of the box cars ordered were furnished.

Plaintiff received 73 cars, 16 of which were refrigerator cars or an adjusted total of 63 cars

The Commission may also have relied on the fact that plaintiff was not in competition with any shipper at terminal points where "conditions and circumstances affecting the promptness of cars supplied at terminal points are such as necesarily give shippers there located

a natural advantage over shippers at nonterminal points."

I would have regarded this statement of the Commission merely as a comment on a contention of the defendant, except for the fact that the Commission's attorneys, on page 32 of their brief filed in this court, found some connection between such statement and the Commission's conclusions that no competitor of plaintiff was unduly preferred.

Nothing in the Act and no decision that I have been able to find permits discrimination as between shippers merely because they are not in the same type of business and therefore do not compete against each other.

The natural advantage of being at a terminal point may on occasions result in more rapid service and slight difference in the cars made available to such shipper but it can not justify the wide disparity of cars shown by the evidence in this case to have been delivered to shippers at terminal points over a shipper at a nonterminal point.

Considering the whole record, I am of the opinion that there is no substantial evidence upon which the Commission could have concluded that the "defendant did not unduly favor shippers other than the complainant."

VII.

"Considering the above, in the light of the facts of this record, we conclude that complainant has failed to establish any violation of sections 1 and 3 as alleged. * * *

"We find that the complainant has failed to establish that defendant during the complaint period engaged in any unreasonable or otherwise unlawful

practice, as alleged, in violation of section 1 of the Act, in furnishing or not furnishing cars to complainant at Oakland, Oreg., or that defendant subjected complainant to any undue prejudice in violation of section 3. The complaint will be dismissed."

If this ultimate conclusion refers solely to the preceeding conclusions of the Commission, such ultimate conclusion is not supported by substantial evidence and is contrary to law. However, the Commission's statement, "Considering the above in the light of the facts of this record," requires an examination of the evidence adduced at the hearing and particularly the Commission's other findings, to determine whether such evidence or findings afford a rational basis for the Commission's ultimate conclusion.

The only other evidence and the only other finding relied upon by the defendant to support the Commission's ultimate conclusion relate to the length of time plaintiff retained freight cars on its siding.

The Commission, on page 402 of its opinion, stated:

"In a further effort to support its contention that the complainant has no legitimate complaint that the distribution of cars made was other than reasonable, and to rebut the evidence that the complainant was not furnished all the cars needed by it, the defendant shows that a number of cars were kept on hand on the complainant's siding for several days during much of the complaint period. Most of the cars placed on the complainant's siding during the period under consideration were on hand when the 7 a.m. track check was made on only 1 or 2 days. One car was on hand 7 days, 2 cars were on hand 6 days, 11 cars were on hand on 5 days, 22 cars were on hand on 4 days, and 56 cars were on hand on 3 days. The complainant indicates that

these may have been cars that were restricted for loading to particular destination areas for which it had no immediate traffic available. During this period the destination of certain cars was restricted by orders of the Car Service Division of the Association of American Railroads. Automobile cars were required to be moved back to automobile production territory, certain gondola cars were required to be moved back to eastern Allegheny territory and to points served by the Denver and Rio Grande Western Railroad Company, and certain other cars owned by Canadian roads had to be moved back to Canada.

"Under emergency conditions such as exist during a period of car shortage, a carrier may be justified in refusing cars to a shipper negligently withholding from shipment cars previously furnished to it. While there is no indication that the defendant's car service practices with respect to the complainant were affected by the holding referred to of cars by the complainant, such holding is relevant in a consideration of the complainant's ability to load cars in addition to those which were furnished."

In view of its other findings, the Commission apparently did not consider the evidence as significant or relevant except in connection with "a consideration of the complainant's ability to load cars in addition to those which were furnished," as to which there was no issue. Defendant did not contend and no evidence was introduced to show that plaintiff, at any time during the complaint period lacked the necessary facilities or the personnel to promptly load all of the freight cars necessary to satisfy its requirements.

In my opinion the Commission did not intend to support its conclusions by the statements or findings hereinbefore set forth. In addition, an examination of Exhibit 42, upon which such statements or findings

were based, when considered in the light of the other evidence, reveals its lack of any probative value.

1. Some of the entries in Exhibit 42 are inconsistent with the defendant's Exhibit 40, which latter exhibit shows the cars furnished plaintiff.

2. A great majority of the cars were moved out within 2 days.

3. When a car was held for more than 3 days, from 13 to 23 other cars were moved in, loaded, and moved out within such period.

4. Of the 664 cars[1] furnished during the complaint period, only 36 were found to be on plaintiff's siding for more than 3 days, when the daily 7 a.m. track check was made.

5. During the months of August and September, 35 per cent and 60 per cent of all cars furnished plaintiff were not box cars, but were refrigerator, stock, flat or gondola cars. The same situation obtained, to a lesser extent, in other months during the complaint period. A number of these cars were of limited value to the plaintiff. The automobile and refrigerator cars were restricted to particular destinations and the refrigerator cars could only be used for the shipment of boxes and they could only be loaded by hand.

It is apparent therefore that the statements of the Commission relative to the length of time cars were retained on plaintiff's siding do not support the Commission's conclusions.

VIII.

"Moreover, the evidence presented falls far short of the requirements in a proceeding of this char-

[1]The 593 figure heretofore used in this opinion is the adjusted figure. For explanation see note on page 6 of this opinion.

acter to support an award of reparation. Where special damages are sought, the proof thereof must be as definite and certain as would be necessary under established principles of law to support a judgment in count. Lignam-Vitae Products Corp., v. Alabama G.S.R. Co., 268 I.C.C., 599, 608."

Plaintiff admits that several of the items of damage which it originally claimed were not properly chargeable to the defendant and that other items were so indefinite and speculative as to offer no reasonable basis for an award of damages. All of such items were properly disallowed by the examiner. However, the record does contain evidence of damage as to other claims which will support an award of reparations. A railroad which has violated its statutory duty and has caused a shipper to suffer damage will not be permitted to escape liability solely because the shipper is unable to prove the exact amount of damage suffered. Midland Valley R. Co., vs. Excelsior Coal Co., 86 F. 2d 177, 183, (8 Cir. 1936).

I am in complete accord with the rule that the conclusions of the Commission shall not be overturned except in the rare instances in which there is no rational basis for such conclusions. When a court finds it necessary to overrule a decision of such expert administrative tribunal, I believe that it should set forth in detail the reasons which impel such action. That is my only justification for such a long opinion.

For the reasons heretofore set forth, plaintiff is entitled to a judgment remanding this matter to the Commission for further proceedings in conformity with this opinion.

[Endorsed]: Filed August 25, 1953.

APPENDIX B

RELEVANT PORTIONS OF THE INTERSTATE COMMERCE ACT

Section 1 (1) (49 U.S.C.A. § 1). The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or . . .

(4) It shall be the duty of every common carrier subject to this chapter engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this chapter participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(11) It shall be the duty of every carrier by railroad subject to this chapter to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreason-

able rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

Section 3 (1) (49 U.S.C.A. § 3). It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 9 (49 U.S.C.A. § 9). Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the

corporation or campany defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceedings.

Section 17 (9) (49 U.S.C.A. §17). When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

Administrative Procedure Act of 1946
5 U.S.C.A. § 1009 (e)

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings,

and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Petition upon counsel for respondents by mailing by first class mail, postage fully prepaid, a copy thereof, to each of the following: The Solicitor General of the United States, Department of Justice, Washington 25, D. C.; Edward M. Reidy, Interstate Commerce Commission, Washington 25, D. C.; and by mailing a copy thereof, first class air mail, postage fully prepaid, to each of the following: William L. Harrison, Interstate Commerce Commission, 1056 Flood Building, San Francisco 2, California; James E. Lyons and Charles W. Burkett, Jr., 65 Market Street, San Francisco 5, California; James C. Dezendorf and George B. Campbell, 800 Pacific Building, Portland 4, Oregon.

Dated at Washington, D. C., this 16TH day of May, 1955.

GEORGE L. QUINN, JR.,
Of Counsel for Petitioner,

JUL 8 1955
HAROLD B. WILLEY, Clerk

No. [redacted]85

In the Supreme Court of the United States

OCTOBER TERM, 1954

THE MARTIN BROTHERS BOX COMPANY, A CORPORATION, PETITIONER

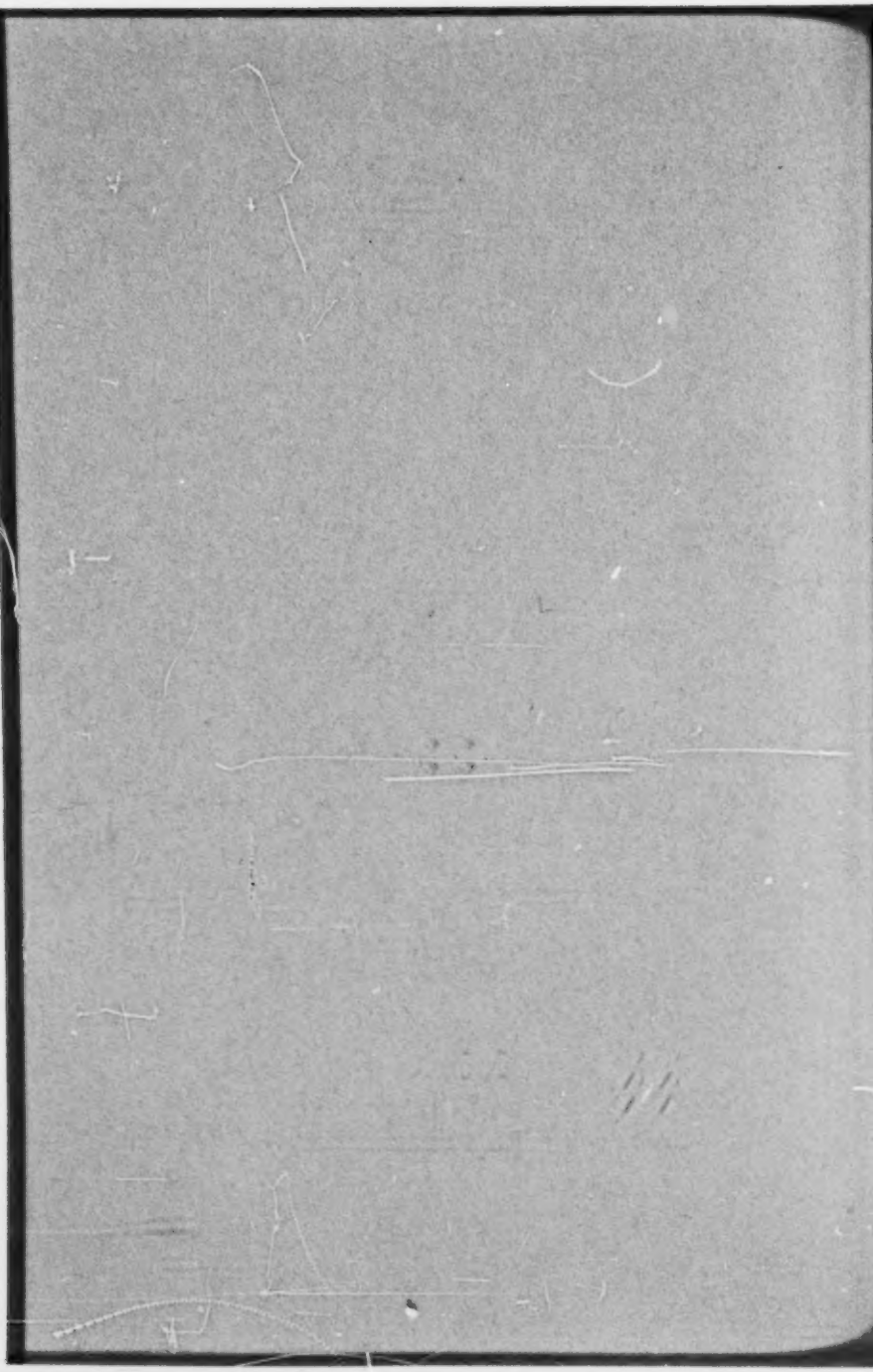
v.

INTERSTATE COMMERCE COMMISSION AND SOUTHERN PACIFIC COMPANY, A CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT INTERSTATE COMMERCE COMMISSION IN OPPOSITION

SAMUEL R. HOWELL,
Associate General Counsel,
For the Interstate Commerce Commission.



INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	2
The Facts	4
Decision of the Court of Appeals	7
Argument	10
Conclusion	16

CASES CITED

Alton Railroad Co. v. *United States*, 315 U. S. 15	10
Baltimore & Ohio R. Co. v. *United States*, 298 U. S. 349	12
Gray v. *Powell*, 314 U. S. 402	10
Hanna Furnace Corp. v. *United States*, 53 F. Supp. 341 (aff'd. 323 U. S. 667)	10, 12
Illinois Central Railroad Co. v. *Interstate Commerce Commission*, 206 U. S. 441	14
Johnston Seed Co. v. *United States*, 191 F. 2d 228	11
Labor Board v. *American Ins. Co.*, 343 U. S. 395	12
Mississippi Valley Barge Line Co. v. *United States*, 292 U. S. 282	12
Nashville Ry. v. *Tennessee*, 262 U. S. 318	14
Swayne & Hoyt, Ltd. v. *United States*, 300 U. S. 297	14
United States v. *Chemical Foundation, Inc.*, 272 U. S. 1	11
Universal Camera Corp. v. *Labor Board*, 340 U. S. 474	12
Virginia Stage Lines v. *United States*, 48 F. Supp. 79	10, 12
Virginian Ry. Co. v. *United States*, 272 U. S. 658	10, 14
Western Chemical Co. v. *United States*, 271 U. S. 268	9, 12

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 804

THE MARTIN BROTHERS BOX COMPANY, A CORPORATION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND SOUTHERN PACIFIC COMPANY, A CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT INTERSTATE COMMERCE COMMISSION IN OPPOSITION

OPINIONS BELOW

The report of Division 3 of the Interstate Commerce Commission (R. 108) is reported at 280 I.C.C. 395. The opinion of the District Court for the District of Oregon (R. 42-75) is reported at 128 F. Supp. 919. The opinion of the Court of Appeals (R. 846-868) is reported at 219 F. 2d 811.

JURISDICTION

The judgment of the Court of Appeals was entered January 10, 1955 (R. 869). Petition for Rehearing was denied March 1, 1955 (R. 870). The petition for a writ of certiorari was filed May 18, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Whether, in reversing the District Court, the Court of Appeals erred in holding that the evidence sustained the findings of the Commission that the Southern Pacific had not engaged in any unreasonable or otherwise unlawful practice in furnishing cars to petitioner, and that the carrier had not subjected petitioner to any undue prejudice or discrimination.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act and the Administrative Procedure Act are set forth in the Appendix to the petition.

STATEMENT

On October 14, 1947, Martin Brothers Box Company filed with the Interstate Commerce Commission a complaint in which it alleged that between January 1, 1947 and September 30, 1947, the Southern Pacific failed in its duty to provide and furnish the petitioner with adequate cars for the transportation of its shipments, consisting of shipping containers (wire-bound boxes), veneer, and lumber, from Oakland, Oreg., to points in other

states, in violation of sections 1 and 3 of the Interstate Commerce Act (R. 77-81).

After hearing, an examiner issued a proposed report in which he recommended that the Commission find that the Southern Pacific had failed in its duty to provide and furnish transportation from petitioner's plant at Oakland, Oreg., upon reasonable request therefor, and that an award of reparations be made (R. 84-106). Following exceptions made to the proposed report, oral argument was heard before Division 3 of the Commission (R. 656-683). Thereafter, Division 3 issued its decision and order in the case finding that petitioner had failed to establish that the Southern Pacific had engaged in any unreasonable or otherwise unlawful practices, in violation of section 1 of the Act, in furnishing or not furnishing cars to petitioner at its Oakland, Oreg., plant, or that the Southern Pacific had subjected petitioner to any undue prejudice in violation of section 3 (R. 108-127). The petition for reconsideration was denied by the entire Commission (R. 128).

The petitioner on November 27, 1951, filed a suit in the United States District Court for the District of Oregon to enjoin and set aside the order (R. 3-28). The judgment of the District Court annulled, vacated, suspended, and set aside the Commission's order which had denied reparation and remanded the case to the Commission for further proceedings not inconsistent with the Court's opinion, findings and conclusions (R. 74-75). Thereafter, the case was appealed to the

Court of Appeals, Ninth Circuit, which reversed the judgment of the District Court, one judge dissenting, and petitioner has asked that a writ of certiorari issue to review that judgment (R. 846-868).

THE FACTS

Petitioner required and needed a considerable number of cars in excess of those the Southern Pacific was able to furnish for the movement of lumber and wire-bound boxes from Oakland, Oreg., to destinations in other states. Its estimate was 13 cars daily on a 5-day week basis (R. 110, 149-150). During the period covered by the complaint proceedings before the Commission (January 1 to September 30, 1947) there was a critical shortage of cars on the Southern Pacific, as well as on all other railroads of the country (R. 446, 452, 503-504), a fact admitted by petitioner's president (R. 177-178).[1] The shortage on the Portland Division

[1] The Commission found in its report (R. 78, p. 400 of 280 I.C.C.) that:

> After the close of World War II, the Nation as a whole experienced a great industrial development, and during 1947 the Nation's railroads experienced for the first time since 1920, except in the war period, an average daily shortage of cars. During most of the period between World War I and World War II, they had on hand large surpluses of cars, the worst year being 1932 when the average daily surplus amounted to 694,022 cars. During 1947 the national daily shortage was 18,672 cars, and the defendant was individually faced with an average daily shortage of 583 cars of the types used for the transportation of forest products. Because of the sizeable surplus experienced prior to World War II, the Nation's railroads, including the defendant, did not anticipate the unusual demand for cars that arose in 1947.

of the Southern Pacific (on which petitioner's plant was located) was more serious from July to the latter part of October 1947 (R. 555-556). This fact is further admitted by petitioner, at page 3 of its petition.

The car orders of shippers located on the Southern Pacific, including those at points on its Portland Division, were far in excess of the supply available (R. 446, 453, 501-506).[2]

In view of the car shortage situation it was necessary for the railroad to have definite car orders from shippers so as to remove any confusion as to needs and to see that the number and type of car required was placed on the particular day it was needed in order that no car would remain unnecessarily idle at any plant. It was the general practice of the Southern Pacific to furnish cars when specific and definite orders had been placed (R. 565, 610).[3] Petitioner placed both written and oral orders (R. 589), and the railroad requested that it place specific orders for cars (R. 610).

---

[2] In order to arrive at a method of equitable distribution of cars among shippers the railroad devised a formula based on the production of mills, capacity to load cars, the supply of cars available for distribution and the number of car orders filed by the mill with the carrier (R. 561-564). The formula was applied after July 1, 1947, to all shippers on the Portland Division, including petitioner. It was not in effect prior thereto because the car shortage was not as severe then as during the latter period (R. 565-566).

[3] During the complaint period the Southern Pacific did not require shippers to place written orders and oral orders were honored when clear and definite. However, such orders were reduced to writing on car order forms by the agent of the Southern Pacific receiving them (R. 589-590).

There was evidence of confusion and conflicting requests on the part of petitioner's agents and officers as to the number of cars needed (R. 609-610).

Petitioner required water-tight box cars for the shipment of its wire-bound boxes and veneer lumber during the complaint period. However, flat and gondola cars were acceptable for lumber shipments (R. 208-209). Over one-half of the cars furnished petitioner were for the transportation of wire-bound boxes (R. 775).[4]

The petitioner was not the only shipper who experienced delays in receiving cars. The railroad received numerous complaints from other shippers during the complaint period (January 1 to September 30, 1947), and from July to October of that year the complaints ran into "thousands" (R. 616).

As heretofore shown it was the general practice of the Southern Pacific to furnish cars to lumber shippers in Oregon only on specific and definite orders. The petitioner and other shippers alike were furnished cars by the Southern Pacific only upon definite and specific orders (Petitioner's Exhibit No. 2, R. 704-759).

After reviewing the evidence on the record as a whole the Commission found and concluded (R. 124-125, Commission's Report, p. 404 of 280 I.C.C.) that:

---

[4] The Southern Pacific obviously could not furnish cars properly without knowing the type needed on particular days. It could not rely on general estimates of future need.

The evidence establishes that from January 1 to June 30, 1947, complainant received practically all of the cars for which specific written car orders were placed; that thereafter in the complaint period more cars were furnished than were requested by written orders, though some delays were experienced; that complainant desired, required, and attempted to secure additional cars from defendant; that defendant and its employees made reasonable, and sometimes successful, efforts to furnish additional cars to complainant; that by reason of its inability to secure cars at all times when needed complainant was unable to fill some orders placed with it; that during 1947 defendant suffered a daily shortage of 583 freight cars; that such shortage was a general one for which no direct responsibility can be placed upon defendant; and that it is not shown that defendant unduly favored shippers other than complainant.

DECISION OF THE COURT OF APPEALS

The Commission had held that the evidence presented fell far short of supporting an award of reparation as petitioner failed to establish that the Southern Pacific had engaged in any unreasonable or otherwise unlawful practice, in furnishing or not furnishing cars to petitioner, in violation of section 1 of the Act or that the railroad had subjected petitioner to any undue prejudice or discrimination, in violation of section 3.

In the majority opinion the Court of Appeals pointed out (219 F. 2d 811, 814-815) that the Commission had impartially and at great length summarized the evidence before it and that in no particular can any distortion of the record be found. It called attention to the fact that, in the Commission's summary, evidence is recited in behalf of petitioner which would support a ruling in its favor but there was substantial evidence presented by the railroad pointing in the opposite direction.

The majority opinion, by Circuit Judge Healy, then pointed out (p. 816) that "the shipper's proof of damages was sufficiently specific to have supported an award in some amount had the Commission held in favor of the shipper on the issue of statutory violation."[5] Circuit Judge

[5] The opinion quoted with approval (p. 815) the following conclusion of the Commission made in disposing of petitioner's complaint (R. 125-126):

* * * "Complainant [petitioner herein] alleges violations of section 1(4), section 1(11) and section 3(1) of the Interstate Commerce Act. Under those sections defendant is required, in part, to provide and furnish transportation upon reasonable request; to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and not to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, locality, or territory. The right of a shipper to cars, however, is not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made and which it could not reasonably have been expected to meet in full. The law exacts only what is reasonable from such carriers, but at the same time requires that they should be equally reasonable in the treatment of their patrons.

(CONTINUED ON PAGE 9)

Chambers, concurred in the results reached by Judge Healy, "on the ground that under the record the Commission was not clearly wrong in finding there was no undue discrimination under the circumstances of the case."

The finding by the majority (p. 813), that the Commission's order is supported by substantial evidence, is clearly correct. This is shown by reference to the evidence of record in the case, which is summarized in the Commission's report and referred to in the majority opinion of the Court of Appeals. The Court correctly stated the scope of judicial review of Commission orders, pointing out that such orders are not to be set aside if they are within the Commission's statutory power and are supported by substantial evidence; and that "To consider the weight of the evidence before the Commission, or the soundness of the reasoning by which its conclusions were reached, is beyond the province of the courts."[6] This finding is supported by numerous decisions of the courts, including *Western Chemical Co.* v. *United States*, 271 U.S. 268, 271; *Virginian Ry. Co.* v. *United*

(CONTINUED FROM PAGE 8)

In case of car shortage occasioned by unexpected demands, they are bound to treat shippers fairly, if not identically. [Citing authorities.] Considering the above, in the light of the facts of this record, we conclude that complainant has failed to establish any violation of sections 1 and 3 as alleged."

[6] The District Court erred in attempting to weigh and evaluate the evidence (as it did) upon which the Commission's findings are based instead of limiting its review to a determination of whether the findings were supported by substantial evidence.

States, 272 U.S. 658, 663; *Alton Railroad Company* v. *United States,* 315 U.S. 15; *Gray* v. *Powell,* 314 U.S. 402; *Hanna Furnace Corp.* v. *United States,* 53 F. Supp. 341, 344 (aff'd 323 U.S. 667); *Virginia Stage Lines* v. *United States,* 48 F. Supp. 79, 83.

ARGUMENT

What the petitioner here seeks is a review of the decisions of the Commission and the Court of Appeals for the purpose of sustaining the District Court's action in weighing the evidence, contrary to principles of judicial review of administrative tribunals, and reaching a conclusion different from that arrived at by the Commission and the Court of Appeals.

As we heretofore have pointed out the question presented by the petition is whether the Commission's order is supported by substantial evidence. From a review of the opinion of the District Court it is clear that its judgment was predicated upon an analysis and evaluation of the evidence and only that which was summarized and discussed in the Commission's report. No other record evidence apparently was considered by that Court. We have already shown above that it is the task of the Commission and not the court to weigh and evaluate the evidence.[7]

The Commission had made findings and arrived at conclusions that the evidence presented fell far short of the requirements to support an award of

---

[7] The majority opinion of the Court of Appeals refers to this well-established principle of judicial review.

reparation. Also that petitioner had failed to establish that the Southern Pacific engaged in any unreasonable or otherwise unlawful practice, in violation of section 1 of the Act, or had subjected petitioner to any undue prejudice in violation of section 3.

It is respectfully submitted that the Commission's findings and conclusions are supported by substantial evidence on the record as a whole, much of which is discussed in the Commission's report. It must be pointed out that the findings are factual conclusions made after careful review and evaluation of the entire record. They are not made in the sense of factual findings susceptible of demonstration by reference to uncontroverted or specific evidence. The findings represent the judgment of the Commission based upon the facts adduced at the hearings and interpreted in the light of its expert knowledge of the field of transportation. *Johnston Seed Co.* v. *United States*, 191 F. 2d 228, 231.

The most that the District Court could do was merely to determine whether there was any substantial evidence to support the Commission's findings. As we have shown, it went far beyond this. In view of the fact that the question presented here has been before the courts so many times and this Court, as well as other federal courts, has defined the scope of judicial review, which has become standardized in the judicial system, *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15; *Baltimore & Ohio R. Co.* v.

United States, 298 U.S. 349, 358-60; *Western Chemical Co.* v. *United States*, *supra*; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282; *Virginia Stage Lines* v. *United States*, *supra*; *Hanna Furnace Corp.* v. *United States*, *supra*, we insist that petitioner fails to demonstrate that the decision of the Court of Appeals raises questions of any general importance, and that there is conflict with the decision of any other court.

Appellant requests this Court to reexamine the record to determine whether the Court of Appeals is correct. This Court has indicated clearly its attitude toward such requests. *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474. In that case the Court spelled out the proper standard of review of administrative orders and then continued at pp. 490-491:

> Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.

See also *Labor Board* v. *American Ins. Co.*, 343 U.S. 395, 409-410.

1. It is claimed by petitioner (Pet. pp. 6-7) that the Commission determined as a fact that during

the time petitioner was being supplied with about 30 per cent of the cars needed by it, other shippers were furnished an average of 80 per cent of their requirements, and, therefore, the Commission's ultimate finding that it had not been shown that the Southern Pacific engaged in any unreasonable or otherwise unlawful practice or to have subjected petitioner to any undue prejudice, was erroneous.

It is submitted that the premise upon which the petitioner's above conclusion is based is entirely false since the evidence shows (as heretofore pointed out) that petitioner was furnished all the cars for which specific and definite orders were placed; also that general and conflicting orders were placed by petitioner (R. 609-610). All specific orders, whether written or oral were honored. The definite and specific oral orders were reduced to writing by the carrier, and petitioner was accorded equal treatment with other shippers, who likewise received no more cars than those for which definite orders had been placed. The practice established by the carrier of requiring definite orders obviously is highly necessary, particularly during times of car shortage.

The Commission found (R. 115) that the evidence presented by a witness (testifying for petitioner) "indicate[s] that cars approximately as ordered were promptly delivered to the complainant from January to June, inclusive, but that from July to September, inclusive, a considerable amount of delay in receiving cars was encountered." It then concluded (R. 124) that the evi-

dence establishes that from January 1 to June 30, 1947, complainant received practically all of the cars for which specific written car orders were placed;[8] that thereafter in the complaint period more cars were furnished then were requested by written order, though some delays were experienced.

It, therefore, appears instead of petitioner receiving only 30 per cent of the cars for which it had placed definite and specific orders, that it received practically 100 per cent of such cars (R. 748-759). In view of such evidence and other evidence contained in the record as a whole, to some of which we have heretofore referred, it is difficult to see how the Commission could have reached any other conclusion than that petitioner had failed to establish that the Southern Pacific had engaged in any unreasonable or otherwise unlawful practice in furnishing or in failing to furnish cars to petitioner, in violation of section 1 of the Act, or that the railroad had subjected petitioner to any undue prejudice in violation of section 3.[9]

---

[8] The record indicates that this includes orders written by petitioner as well as those definite and specific oral orders placed with the Southern Pacific, later reduced to writing by its agents (R. 589-590).

[9] The question of the reasonableness of requests for car service and the question of discrimination are not questions of law but of fact within the exclusive jurisdiction of the Commission. *Illinois Central R.R. Co.* v. *Interstate Commerce Commission*, 260 U.S. 441, 454; *Nashville Ry.* v. *Tennessee*, 262 U.S. 318, 322; *Virginian Ry Co.* v. *United States*, 272 U.S. 658, 665-666; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 304.

2. In regard to the petitioner's claim (Pet. p. 9) that the Commission had denied it any relief on the ground that it had not established the fact of competition with shippers "favored by the carrier", it is submitted that the Commission did not predicate its decision on any such finding. This theory of petitioner's case is based on the statement made in the Commission's report (R. 121) that "The complainant has not established that any of its competitors was unduly preferred by the practices of the defendant [Southern Pacific] here assailed."

The Commission's report itself shows that its decision is supported without regard to the question of competitive relationship between petitioner and any other shipper. Judge Pope, in his dissenting opinion, entirely overlooks this fact.

We submit that petitioner's contention that the Commission denied it relief because of its failure to establish the fact that it was in competition with other shippers is fully answered in the majority opinion of the Court of Appeals which states in footnote 7 (R. 853) that:

> An argument is advanced that the Commission misinterpreted the requirements of section 3(1) of the Interstate Commerce Act, in that it is said to have believed there could be no violation of the section unless undue preference was extended to *competitors* of the complaining shipper. The Commission's report and findings afford no basis for the argument.
>
> In this connection it is significant to recall that even the much relied upon report of the

> examiner did not recommend a finding that the carrier had subjected the complainant to undue prejudice in contravention of section 3 of the Act. * * *

It is respectfully submitted that there is substantial evidence in the record as a whole to support the Commission's action in this case. We further submit that no question of general importance is presented and no conflict with the decisions of this Court or any other federal court is shown, including those cited and relied upon by petitioner, which are clearly distinguishable from the factual or legal questions involved herein.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SAMUEL R. HOWELL,
Associate General Counsel

JULY, 1955.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 949000 1974

FILED
JUL 14 1955
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 85

THE MARTIN BROTHERS BOX COMPANY, a corporation,

Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION and SOUTHERN PACIFIC COMPANY, a corporation,

Respondents.

Brief of Respondent Southern Pacific Company in Opposition to Petition For Writ of Certiorari

JAMES C. DEZENDORF
GEORGE B. CAMPBELL
800 Pacific Building
Portland 4, Oregon
JAMES E. LYONS
CHARLES W. BURKETT, JR.
65 Market Street
San Francisco 5, California
Counsel for Respondent Southern Pacific Company

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

INDEX

	Page
Reply to "Question Presented" and "Statement of the Case"..	2
Reply to "Reasons for Granting the Writ"	5
1. The Commission's Decision Is Not Depedent on the Noncompetitive Relationship Between Petitioner and Other Shippers	5
2. The Contention That Other Shippers Received 80 Percent of Their Car Requirements Whereas Petitioner Received Only 30 Percent of Its Car Requirements Rests on a Comparison of Unlike Things	7
3. The Record Contains Substantial Evidence to Support the Commission's Findings of Fact	8
A. The record shows that on the basis of the practice followed by other shippers and petitioner itself in ordering cars, petitioner received treatment in car service at least equal to that accorded to other lumber shippers in Oregon	10
B. The record shows that Martin Brothers held box cars, as well as other types of cars, for three or more days after they had been placed on its spur track at Oakland	12
C. Petitioner's own evidence shows that it cancelled car orders during the complaint period	16
4. The Decision of the Court of Appeals Is Not in Conflict With Any Decisions of This Court or Courts of Other Circuits	17
Conclusion	21

CITATIONS

	Pages
Bernstein Bros. Pipe & Mach. Co. v. Denver & R.G.W.R. Co., 193 F.2d 441	19
Florida East Coast Line v. United States, 234 U.S. 167	17
Great Nor. Ry. Co. v. Merchants Elev. Co., 259 U.S. 285	19
Inter-City Transp. Co. v. United States, 89 F. Supp. 441	3
Interstate Com. Commn. v. Baltimore & O.R. Co., 43 Fed. 37, affd. 145 U.S. 263	8
Johnston Seed Co. v. United States, 191 F.2d 228	9
Nashville Ry. v. Tennessee, 262 U.S. 318	9
Radio Commn. v. Nelson Bros. Co., 289 U.S. 266	3
Swayne & Hoyt v. United States, 300 U.S. 297	9
Swift & Co. v. Baltimore & O.R. Co., 266 I.C.C. 55	18
Victor-American Fuel Co. v. Denver & S.L.R. Co., 115 I.C.C. 169	7
Virginian Ry. Co. v. United States, 272 U.S. 658	9
United States v. Baltimore & O.R. Co., 333 U.S. 169	18
United States v. Interstate Com. Commn., 198 F.2d 958, cert. den. 344 U.S. 893	19, 20
United States v. Missouri-Kansas-Texas R. Co., 194 F.2d 777	19

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 804

THE MARTIN BROTHERS BOX COMPANY, a corporation,

Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION and SOUTHERN PACIFIC COMPANY, a corporation,

Respondents.

Brief of Respondent Southern Pacific Company in Opposition to Petition For Writ of Certiorari

The sole ultimate question presented in the petition for writ of certiorari is whether the findings of fact made by the Interstate Commerce Commission in its report are supported by substantial evidence. We shall show this to be so, and then demonstrate that the Commission's[1] findings of

1. The parties are herein referred to at times as Martin Brothers, the Commission and Southern Pacific. In various quotations Martin Brothers is referred to as Martin or complainant and Southern Pacific as defendant.

fact are supported by substantial evidence and that the decision of the Court of Appeals for the Ninth Circuit is not in conflict with other decisions of this Court or courts of appeals of another circuit.

REPLY TO "QUESTION PRESENTED" AND "STATEMENT OF THE CASE"

We cannot accept petitioner's statement of "Question Presented" or "Statement of the Case" set forth in the petition, and accordingly make our own presentation thereof.

The prior proceedings before the Interstate Commerce Commission and the District Court are stated in the opinion of the Court of Appeals. That statement, which was challenged neither by Judge Pope in his dissenting opinion in the Court of Appeals nor by petitioner in its petition for rehearing in the Court of Appeals, follows:

> "In October of 1947 appellee, hereafter generally called Martin, filed a complaint with the Interstate Commerce Commission alleging that during the period January 1 to September 30, 1947, the Southern Pacific Company failed in its duty to provide and furnish complainant with an adequate supply of box cars for the transportation of its manufactured products from its Oakland, Oregon plant to interstate destinations, in violation of § 1(4) and (11) and § 3(1) of the Interstate Commerce Act, 49 USCA § 1(4) and (11) and § 3(1). The relief asked was that the Commission enter an order commanding Southern Pacific to provide Martin with adequate and equal car service from Oakland, Oregon, to various destinations, and to pay Martin a sum in excess of two million dollars by way of damages. Southern Pacific intervened and in its answer denied the material allegations of the complaint.
>
> The matter was assigned for formal hearings before an examiner for the Commission. Following such hearings the examiner made a proposed report recommend-

ing that the Commission find that Southern Pacific failed in its duty to furnish adequate car service to Martin and that damages be awarded the latter in the amount of approximately $135,000 for such failure.[2] Exceptions to the examiner's report were taken by Martin and Southern Pacific, and after argument Division 3 of the Commission made the report and order here under attack. In its report the Commission, under the heading 'Conclusions,' made, among others, the following ultimate finding: 'We find that complainant has failed to establish that [Southern Pacific] during the complaint period engaged in any unreasonable or otherwise unlawful practice, as alleged, in violation of section 1 of the act in furnishing or not furnishing cars to complainant, * * * or that [Southern Pacific] subjected complainant to any undue prejudice in violation of section 3.' The complaint was ordered dismissed. Martin petitioned for reconsideration and its petition was denied by the entire Commission by unanimous vote of its membership.

Martin then filed a complaint in the court below naming the Commission and the United States as

---

2. A footnote to the opinion here states:

"The finding proposed by the examiner was in response to the claim of violation of the statute requiring rail carriers to furnish cars 'on reasonable request.' No finding was recommended that the railroad had subjected the complainant to undue prejudice in contravention of Section 3 of the Act.

"We may note here that the examiner's recommendations were not binding on the Commission. See Radio Commission v. Nelson Bros. Co., 289 U.S. 266, 285-286, where the Court said: 'Complaint is also made that the Commission did not adopt the recommendations of its examiner. But the Commission had the responsibility of decision and was not only at liberty but was required to reach its own conclusions upon the evidence.' While this holding had to do with action of the Radio Commission, we have found in the authorities no indication that the same principle is not applicable to holdings of the Interstate Commerce Commission. See Inter-City Transp. Co. v. United States, 89 F. Supp. 441, 445, where the same principle was applied to a decision of the Interstate Commerce Commission, the court citing Nelson Bros. Co., supra."

> defendants. The complaint asked that the Commission's order be set aside as invalid for a variety of reasons. One of these was that the order lacks a rational basis because the findings do not support the Commission's conclusions. Another was that the Commission's findings of fact show that Martin was damaged and is entitled to reparation, and that such findings support no other conclusion. Other reasons assigned were that the Commission misapplied the law and that its action was arbitrary and capricious. The court was asked to enjoin and set aside the order and to remand the case to the Commission with directions to award such damages as the court shall find Martin to be entitled to. * * * On the basis of the record before the Commission the court made findings of fact and conclusions of law to the effect *that the Commission's report and order are not supported by substantial evidence.*[3] Judgment was entered vacating the order and remanding the cause to the Commission with directions to take further action not inconsistent with the court's decision. The matter is before us on appeal from the judgment." (R. 846-848)[4]

The Court of Appeals decision reversed the italicized determination of the District Court "that the Commission's report and order are not supported by substantial evidence". Thus, it necessarily follows that the question presented is whether the Court of Appeals erred in determining that the record made before the Interstate Commerce Commission did contain substantial evidence to support the ultimate findings of fact made by that Commission, viz.:

> "We find that complainant has failed to establish that defendant during the complaint period engaged in any unreasonable or otherwise unlawful practice, as

---

3. Italics provided.

4. References in this brief as designated by "R.—" are, like those in the petition, to the record in the Court of Appeals.

> alleged, in violation of section 1 of the act, in furnishing or not furnishing cars to complainant at Oakland, Oreg.; or that defendant subjected complainant to any undue prejudice in violation of section 3."

So far as it differs from this statement of the question presented, petitioner's statement at pages 2 and 3 of its petition is in error. The first sentence of that statement is clearly defective so far as it fails to refer to any question as to whether the Commission's findings are supported by substantial evidence. The second sentence of that statement, as well as the third and fourth paragraphs of petitioner's "Statement of the Case", perpetuates petitioner's error, which has run through this case, of considering *car orders* and *shipping capacity* as identical, with a resulting comparison of unlike things as if they were like (developed *infra*). The reference in the second sentence of petitioner's statement to its failure to show "that it was in a competing business with the favored shippers" attempts to bring before this court a consideration which was not relied upon by the Court of Appeals in its decision, and which we do not rely upon in this brief (developed *infra*).

REPLY TO "REASONS FOR GRANTING THE WRIT"

1. The Commission's Decision Is Not Dependent on the Noncompetitive Relationship Between Petitioner and Other Shippers

At the beginning of its statement as to "Reasons for Granting the Writ" (p. 6), petitioner quotes the following from the dissenting opinion of Judge Pope:

> "If this decision stands the railroads can proceed, wholly without hindrance from the Commission, so to pick and choose among shippers that they will, in many instances, be exercising the power to say which industries shall live and which shall die."

This statement is not warranted, because the record shows, as we shall demonstrate *infra*, that petitioner received substantially the same treatment in car distribution and car supply as did other shippers.

The succeeding text of Judge Pope's dissenting opinion rests on the principal premise that the Commission's finding of fact "that complainant has failed to establish * * * that defendant subjected complainant to any undue prejudice in violation of Section 3" was dependent on a lack of competitive relationship between petitioner and other shippers. This is not the fact. As properly stated in footnote 7 to the opinion of the Court of Appeals:

> "An argument is advanced that the Commission misinterpreted the requirements of section 3(1) of the Interstate Commerce Act, in that it is said to have believed there could be no violation of the section unless undue preference was extended to competitors of the complaining shipper. The Commission's report and findings afford no basis for the argument.
>
> In this connection it is significant to recall that even the much relied upon report of the examiner did not recommend a finding that the carrier had subjected the complainant to undue prejudice in contravention of section 3 of the Act. * * *". (R. 853)

We unequivocally state that in this brief we place no reliance on any showing of a lack of competitive relationship between petitioner and other shippers as supporting the Commission decision. We shall demonstrate that the decision of the Commission is fully supported independently of the question of whether it was necessary for petitioner to show that its competitors had been unduly preferred.

2. The Contention That Other Shippers Received 80 Percent of Their Car Requirements Whereas Petitioner Received Only 30 Percent of Its Car Requirements Rests on a Comparison of Unlike Things

The petition contains frequent reference to the contention that other shippers generally were supplied with 80 percent of the cars required by them whereas petitioner received only 30 percent of the cars it required. This comparison as drawn by petitioner is fatally defective, because it does not compare like with like; i.e., petitioner uses the word "requirements" in two entirely different senses: "cars specifically ordered" and "shipping capacity". The 80 percent of the "requirements" of other shippers, referred to as having been furnished, was of the cars specifically ordered by them, as is clearly shown on the face of Exhibit No. 31 before the Commission (R. 797). On the other hand, the 30 percent of petitioner's "requirements" referred to as having been furnished was of petitioner's shipping capacity.

The complete distinction between "cars ordered" and "shipping capacity" (which may provide the basis for a rating to be used in making a reasonable car distribution in a time of general car shortage[5]) is illustrated in the following statement of the Interstate Commerce Commission in *Victor-American Fuel Co. v. Denver & S.L.R.Co.* (1926), 115 I.C.C. 169, 173-174:

> "Obviously the mine's order represents its maximum need on any day. To ignore the order when for less cars than the rating [based on capacity], and use the rating in lieu thereof, as the basis for car distribution, constitutes an unreasonable and wasteful practice. It here resulted in the furnishing to certain mines of more cars than they could use at times when other mines served by the railroad were being deprived of their ratable requirements for cars."

5. No question of propriety of rating is here in issue.

Petitioner's failure to compare like with like not only is defective on its face but is not the type of showing required to establish "an undue prejudice" which petitioner seeks to establish as a matter of law. It was established at an early time that the prejudice prohibited by Section 3 must be "an undue prejudice", and to establish such an undue prejudice like must be compared with like. *Interstate Com. Commn. v. Baltimore & O. R. Co.* (C.C. Ohio, 1890), 43 Fed. 37, 47, affd. 145 U.S. 263.

3. The Record Contains Substantial Evidence to Support the Commission's Findings of Fact

Much of the argument presented by petitioner rests on the premise that the question of whether Southern Pacific Company subjected Martin Brothers to any undue prejudice in violation of Section 3 of the Interstate Commerce Act is a conclusion of law which the courts possess the same latitude to determine as does the Commission. Contrariwise, it has been well settled that this is a determination of fact and the function of the courts on judicial review is to decide whether the record contains substantial evidence to support findings of the Commission which result from that determination. The opinion of the Court of Appeals well summarizes the authorities in its following discussion of this subject:

> "It appears from the trial court's decision that it regarded the conclusions of the Commission, quoted above, as conclusions of law rather than as findings of ultimate fact. Such approach is erroneous. The courts have repeatedly pointed out that whether given rates or practices are 'reasonable' or 'unduly prejudicial' are factual determinations confided by Congress to the judgment and discretion of the Commission. That this must be so is manifest since the sections of the Act

involved contain no definition of what is reasonable or unreasonable or what constitutes undue prejudice. We quote from or summarize a few of the decisions. In Virginian Ry. Co. v. United States, supra, p. 665, it was held: 'The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal "informed by experience."' In Nashville Ry. v. Tennessee, 262 U.S. 318, 322, it was said: 'Whether a preference or discrimination is undue, unreasonable or unjust is ordinarily left to the Commission for decision; and the determination is to be made, as a question of fact, on the matters proved in the particular case.' And in Swayne & Hoyt v. United States, 300 U.S. 297, 304, the Court said that whether a discrimination in rates or services is undue or unreasonable has always been regarded as peculiarly a question committed to the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic. Cf. also Johnston Seed Co. v. United States, CA 10, 191 F.2d 228." (R. 849-850)

Thus, regarding as determinations of fact the Commission's findings that Martin Brothers failed to establish that Southern Pacific during the complaint period "engaged in any unreasonable or otherwise unlawful practice, as alleged, in violation of Section 1 of the act in furnishing or not furnishing cars to complainant at Oakland, Oreg." or that Southern Pacific subjected Martin Brothers "to any undue prejudice in violation of Section 3," we now show that the record does contain adequate supporting evidence. That evidence falls within three distinct categories, any one of which alone would be "substantial."

A. THE RECORD SHOWS THAT ON THE BASIS OF THE PRACTICE FOLLOWED BY OTHER SHIPPERS AND PETITIONER ITSELF IN ORDERING CARS, PETITIONER RECEIVED TREATMENT IN CAR SERVICE AT LEAST EQUAL TO THAT ACCORDED TO OTHER LUMBER SHIPPERS IN OREGON.

The one common yardstick of record available to compare the car service accorded other shippers generally and that accorded petitioner consists of car orders.

On the basis of cars furnished to cars ordered, both by other shippers and by petitioner, the record shows the comparison to be the following:

Average percentage furnished of all box, gondola and flat cars specifically ordered by shippers of all commodities on Southern Pacific's lines, including the Portland Division 80%
(R. 797)

Percentage furnished of such cars specifically ordered by petitioner 100%
(R. 748-759)

The propriety of using car orders as a common yardstick is attested by the showing of record that it was not, and is not, the practice of Southern Pacific to furnish cars, either to shippers in general or to lumber shippers in Oregon in particular, in response to general advance statements or representations made by shippers concerning their potential shipping capacities or their probable future shipping needs. The record shows that, specifically during the complaint period, the general practice of Southern Pacific was to furnish cars to lumber shippers in Oregon only if it had received an "order" for the placing of a definite number and type of cars on a particular day. Witness G. M. Leslie, Car Service Agent of Southern Pacific for its Portland Division,[6] testified that cars would be furnished only after car orders had been placed (R. 565); and Martin Brothers, in its own

6. The Portland Division includes practically all the lines of Southern Pacific in Oregon upon which lumber shippers are located.

exhibits, showed that six other Oregon lumber shippers, as well as Martin Brothers itself, received only cars for which they had placed specific car orders (R. 704-759).

During the complaint period there was no requirement that car orders had to be in writing, and it was the practice of shippers to place their specific, day-to-day orders orally as well as in writing. Shippers submitting their orders in writing had available for that purpose pads of printed car-order forms distributed by Southern Pacific. When shippers submitted car orders orally, the orders were reduced to writing on these forms by the agent of Southern Pacific receiving them (R. 589-590).

The record further shows that Martin Brothers itself followed the practice of placing specific day-to-day orders, either in writing or orally by telephone, for cars during the complaint period (R. 589). Most of the written orders placed by Martin Brothers were executed on the printed car-order forms by its employee Mr. R. L. Stapleton at the offices of Martin Brothers, *prior to his receiving any information as to what cars might be available*, and then delivered to the agent of Southern Pacific at Oakland (R. 638).

Not only does this conformity by Martin Brothers with the general practice of placing specific orders for cars establish a definite knowledge of Martin Brothers of the car-order practice and an acquiescence by Martin Brothers in that practice, *but the record shows that prior to the complaint period Martin Brothers was expressly admonished to place specific car orders.* Witness F. C. Nelson, Freight Traffic Manager of Southern Pacific at Portland, Oregon, testified that, in an extended conversation respecting the car-supply situation, held at his office in August, 1946, with Mr. R. G. Holland, representing Martin

Brothers, he specifically told Mr. Holland "to be sure to have his people place car orders for the cars" (R. 610). This statement was not denied by Mr. Holland, who appeared as a witness at the hearing (R. 275), and stands uncontradicted.

B. THE RECORD SHOWS THAT MARTIN BROTHERS HELD BOX CARS, AS WELL AS OTHER TYPES OF CARS, FOR THREE OR MORE DAYS AFTER THEY HAD BEEN PLACED ON ITS SPUR TRACK AT OAKLAND.

The record contains uncontradicted evidence that during the complaint period Martin Brothers held many cars of all types for three or more days (excluding Sundays or holidays) after they had been placed on its spur track at Oakland. The extent to which Martin Brothers engaged in this practice is shown in the following table, which summarizes cars so held for loading by Martin Brothers during the 228-day complaint period:[7]

Class of Car	Held 3 Days	Held 4 Days	Held 5 Days	Held 6 Days	Held 7 Days	Held 8 Days	Total
Box	55	25	9	4	2	1	96
Auto	31	27	6	3	—	—	67
Refrigerator	11	4	4	3	—	—	22
Stock	1	2	1	1	—	—	5
Gondola	2	—	1	—	—	—	3
Flat	4	2	1	—	—	—	7
All classes	104	60	22	11	2	1	200

(R. 818-843.)

The holding of 200 cars, as shown by this table, for periods ranging from three to eight days during the 228-day complaint period, during which there was a general car shortage, constitutes substantial evidence to support the Commission's findings. That the Commission considered

7. The days shown include the last day but not the time the car was on hand prior to the first 7:00 a.m., and exclude Sundays and holidays.

this evidence as relevant and gave it weight in reaching its ultimate findings of fact is reflected in the fact that the Commission, after describing this evidence in its report, said:

> "Such holding is relevant in a consideration of the complainant's ability to load cars in addition to those which were furnished." (R. 120-121)

Such a holding of cars by petitioner is particularly relevant in comparing the relative treatment received by petitioner and other shippers during a period of general car shortage,[8] when other shippers were in such pressing need of cars. That need is reflected in the following testimony of witness F. C. Nelson:

> "Q. [By Mr. Wedekind] Had you received complaints from any other lumber shippers about the car supply during the period from January 1 to September 30 inclusive, 1947?
>
> A. Yes we did. There was some complaints registered in the early part of the year when we had a car shortage, but it was not as severe as it was later on in the year from July to September and October. During the period from July, 1947 to October, September, and the rest of the year, why we received thousands of

---

8. It is undisputed by all parties that the complaint period was a time of general car shortage for which Southern Pacific Company was not legally responsible. The Commission, in its report after reviewing the evidence of record respecting the subject, stated (R. 118):

> "On these facts the defendant cannot be held accountable for general car shortages on its lines within the period covered by this complaint."

The identical statement was made in the Examiner's proposed report and yet no exception or objection to the statement was ever registered by Martin Brothers, either in its exceptions before the Commission, in its Petition for Reconsideration before the Commission, or in any of the proceedings before the District Court or the Court of Appeals.

complaints, by letter, by telegram, by telephone, by word of mouth, and otherwise.

Q. What was the general nature of those complaints?

A. They were complaining over the fact we were not supplying them with all the cars they wanted. The complaints were spread all over the State of Oregon, even originated in numerous and various parts of the United States. Of course, I only have knowledge of the particular complaints that we received through my office, most of which reached me, if not personally, by word of mouth from those under my jurisdiction and as well I knew a few people at points such as Salem, Eugene, Medford, were also receiving complaints in countless numbers." (R. 616)

Judge Pope, in his dissenting opinion, cites with approval the grounds advanced by the District Court in support of its refusal to consider this substantial evidence (R. 867). Those grounds consisted of references to certain factors as indicating to that court the "lack of any probative value of this evidence". Not only did this constitute a definite weighing of evidence by the court, but certain of the factors so referred to contain statements contrary to and unsupported by the evidence of record. For example, the District Court stated:

> "Of the 664 cars furnished during the complaint period, only 36 were found to be on plaintiff's siding for more than three days, when the daily 7 a.m. track check was made." (R. 72)

But an analysis of the exhibit presenting this showing (R. 818-843) definitely discloses that 104 cars were held by Martin Brothers for three days, excepting Sundays and holidays, following the first 7:00 a.m. after placing, 60 cars were held for four days, 22 cars were held for five days,

11 cars were held for six days, 2 cars were held for seven days, and 1 car was held for eight days. For example, car GN-25173, shown at page 1 of the exhibit under January 8, 1947, was placed some time before 7:00 a.m. of that date but the car was not released by Martin Brothers and did not move out until 7:00 a.m. on January 13, 1947 (R. 818). Thus, the car was actually held six calendar days, but is shown in the table as being held only four days, because the first day is excluded from the figure and one of the intervening days was a Sunday—Sundays and holidays being withheld from all computations of the days cars were held.

The District Court also states that a number of the cars set forth in the above table "were of limited value" to Martin Brothers because of destination restrictions (R. 72). Yet Martin Brothers' president, Mr. F. G. Martin, conceded that no cars loaded by Martin Brothers were ever restricted to any particular destinations. Mr. Martin testified:

> "Examiner Hanson: Did the railroad ever refuse to accept a car that you had billed to a foreign destination?
>
> The Witness: After it was loaded?
>
> Examiner Hanson: When you presented the car and gave them the shipping papers.
>
> The Witness: Not that I know of, not that I can remember." (R. 228)

> "Examiner Hanson: They [Southern Pacific] never required you to ship anywhere?
>
> The Witness: No." (R. 226)

Moreover, although the District Court refers to certain destination limitations as applying to automobile and refrigerator cars, it is apparent from the showing sum-

marized in the above table that less than half of the cars thus held by Martin Brothers for excessive periods were of those two types.

The District Court also states that "Some of the entries in exhibit 42 [R. 818-843] are inconsistent with the defendant's exhibit 40 [R. 804-816]." This is an attempt by the Court to compare unlike situations, because these two exhibits do not purport to constitute the same type of showings; the car statistics of Exhibit No. 42 have their origins in a daily 7:00 a.m. yard check, while the statistics in Exhibit No. 40 were compiled from the original car orders placed with Southern Pacific by Martin Brothers and are not tied down to a 7:00 a.m. time.

The aforesaid statements by the District Court in criticism of Exhibit No. 42, in addition to being contrary to and unsupported by the evidence, reveal by their very content that the Court was attempting to weigh the evidence—a function which it was not the Court's to perform.

C. PETITIONER'S OWN EVIDENCE SHOWS THAT IT CANCELLED CAR ORDERS DURING THE COMPLAINT PERIOD.

Other substantial evidence supporting the Commission's findings is contained in Martin Brothers' own Exhibit No. 8 before the Commission, in which Martin Brothers candidly showed that it cancelled certain of the orders for cars which it had previously placed during the complaint period. That exhibit showed:

Order of Feb. 19, 1947, for 3 cars wanted Feb. 22, 1947, "cancelled"
Order of Feb. 26, 1947, for 2 cars wanted Mar. 1, 1947, "cancelled"
Order of Feb. 26, 1947, for 1 car wanted Mar. 1, 1947, "cancelled"
Order of Feb. 26, 1947, for 1 car wanted Mar. 1, 1947, "cancelled"
Order of Apr. 14, 1947, for 2 cars wanted Apr. 16, 1947, "cancelled for one car"

Order of Apr. 14, 1947, for 1 car wanted Apr. 17, 1947, "cancelled"

Order of June 30, 1947, for 1 car wanted June 30, 1947, "cancelled"

Order of July 2, 1947, for 1 car wanted July 7, 1947, "cancelled"

Order of July 11, 1947, for 1 car wanted July 16, 1947, "cancelled"

(R. 748-759.)

Nor did Martin Brothers' witness Forrest, in presenting Exhibit No. 8, attempt either to qualify or to explain the cancellations shown in his own exhibit.

This is clearly substantial evidence that petitioner during the complaint period was not subjected to any undue prejudice in the distribution of cars.

The only attempt made by petitioner before the Court of Appeals to refute this clear evidence of cancellation of orders was to refer to the testimony of witness F. J. Martin that "If they were cancelled, they were cancelled for the reason that they were either too dirty to load or there were holes in the roof that you could look through" (R. 344). But that testimony of Mr. Martin concerns alleged *rejection* of cars actually received and does not pertain to the *cancellation* of specific orders for cars which had not yet been received, as shown in Exhibit No. 8. Certainly, if petitioner rejected a car as alleged by Mr. Martin, there would have been no rational reason for it to *cancel* its outstanding order for a needed car.

4. The Decision of the Court of Appeals Is not in Conflict With Any Decisions of This Court or Courts of Other Circuits

Petitioner states (p. 7) that the decision of the Court of Appeals herein "is in direct conflict with" *Florida East Coast Line v. United States* (1914), 234 U.S. 167, 185. In that case, the question before this Court was whether an ultimate

determination by the Commission that certain rates on fruits and vegetables should be reduced had evidentiary support. This Court, on reviewing the record, found that it contained *no evidence* to support the Commission's ultimate determination. The Court said (p. 185):

> "While a finding of fact made by the Commission concerning a matter within the scope of the authority delegated to it is binding, and may not be re-examined in the courts, it is undoubted that where it is contended that an order whose enforcement is resisted was rendered without any evidence whatever to support it, the consideration of such a question involves not an issue of fact, but one of law, which it is the duty of the courts to examine and decide."

There is nothing inconsistent between this holding of the Court and the decision of the Court of Appeals herein. For, as has been shown, the record contains substantial evidence to support the Commission's ultimate determinations herein.

In *United States v. Baltimore & O.R.Co.* (1948), 333 U.S. 169, cited at page 8 of the petition, the Commission in its report had resolved the allegation of a violation of Section 3 of the Interstate Commerce Act by making the ultimate finding that the there assailed conduct of the rail carriers "subjects complainant to undue prejudice and unduly prefers the competing plants above named".[9] The rail carriers, on court review, challenged this (and other adverse determinations of the Commission) as outside the power and authority of the Commission. This Court's decision upheld the Commission's decision and, in doing so, specifically referred to the fact that the Commission had "found" discriminatory conduct to exist. This is the exact converse of

9. *Swift & Co. v. Baltimore & O. R. Co.* (1946), 266 I.C.C. 55, 68.

the present case in which the Commission has "found" that petitioner failed to establish "that the defendant subjected complainant to any undue prejudice in violation of Section 3".

Petitioner states (p. 8) that the opinion of the Court of Appeals herein "is also in conflict with" *United States v. Interstate Com. Commn.* (C.A., D.C., 1952), 198 F.2d 958, cert. den. 344 U.S. 893. In support of this contention petitioner quotes a portion of the Court's following statement in that case (p. 968):

> "We recognize that the Commission's views as to questions of law arising in the course of its duties are entitled to very great weight * * * and in the construction of tariffs there are many practical reasons for according a high degree of finality to its determinations. But there are occasions even in this field where the courts are required to apply 'the fixed law to the established fact', * * *. We are of the view, for the reasons stated, that the present record does not adequately support the Commission's conclusion that the tariffs no longer covered terminal services at the Army Base piers after the Government took over their operation. The determination must therefore be set aside. The question of further proceedings in this regard is discussed in the concluding portion of this opinion."

The context from which this quotation is taken concerns only the propriety of the Commission's interpretation of a tariff provision pursuant to an allegation of a violation of Section 6(7) of the Interstate Commerce Act. Such a question of tariff interpretation has always been held to be one of law which the Court, as well as the Commission, may determine.[10]

---

10. *Great Nor. Ry. Co. v. Merchants Elev. Co.* (1922), 259 U.S. 285, 290; *Bernstein Bros. Pipe & Mach. Co. v. Denver & R. G. W. R. Co.* (C.A. 10, 1951), 193 F.2d 441, 444; *United States v. Missouri-Kansas-Texas R. Co.* (C.A. 5, 1952), 194 F.2d 777, 778.

United States v. Interstate Com. Commn., in addition, concerned a judicial review of findings by the Commission respecting alleged violations of Sections 1(5), 1(6) and 2 of the Interstate Commerce Act. The Court's opinion respecting these determinations by the Commission was limited to a discussion of whether they were supported by substantial evidence. Indeed, with respect to the alleged violation of Section 2 (which in its text is somewhat analogous to Section 3) the Court took occasion to indicate this was a fact to be determined in the first instance by the Commission, viz. (p. 973):

> "If the discrimination is to be justified, then, it must be on some basis other than the public-private distinction drawn by the Commission in Weyerhaeuser. *It is not incumbent upon this court to decide in the first instance whether any such basis exists, and we make no ruling on the legality of the discrimination.*" (Italics supplied.)

Therefore, it appears that there is no merit in petitioner's contention that the decision of the Court of Appeals herein is inconsistent with the three cases cited by petitioner. Contrariwise, the holding in each of these three cases fully supports the position of the Court of Appeals that the Court's function of judicial review was limited to determining whether the record contained substantial evidence to support the findings of fact of the Commission respecting the alleged violations of Sections 1(4) and (11) and 3(1) of the Interstate Commerce Act.

CONCLUSION

It is respectfully submitted that the petition should be denied.

San Francisco, California, July 12, 1955.

JAMES C. DEZENDORF
GEORGE B. CAMPBELL
JAMES E. LYONS
CHARLES W. BURKETT, JR.

Counsel for Respondent Southern Pacific Company

CERTIFICATE OF SERVICE

I, CHARLES W. BURKETT, JR., one of counsel for respon
ent Southern Pacific Company, and a member of the B
of the Supreme Court of the United States, hereby certi
that on the 12th day of July, 1955, I served copies of t
foregoing Brief of Respondent Southern Pacific Compa
in Opposition to Petition For Certiorari on the parties
this proceeding, as follows:

1. On petitioner, by mailing copies in duly address
envelopes, with air mail postage prepaid, to its attorne
of record, as follows:

George L. Quinn, Jr., Esq.
815 - 15th Street, N.W.
Washington 5, D.C.

Irving Rand, Esq.
Donald A. Schafer, Esq.
Public Service Building,
Portland 4, Oregon.

2. On the Interstate Commerce Commission, by maili
a copy in a duly addressed envelope, with air mail posta
prepaid, to its General Counsel at the offices of the Co
mission, Washington 25, D.C.

3. On the United States, by mailing a copy in a d
addressed envelope, with air mail postage prepaid, to

The Solicitor General,
Department of Justice,
Washington 25, D.C.

CHARLES W. BURKETT, JR

HAROLD B. WILL

No. 85

In the Supreme Court

of the United States

THE MARTIN BROTHERS BOX COMPANY, a corporation,

Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION and SOUTHERN PACIFIC COMPANY, a corporation,

Respondents.

REPLY BRIEF

GEORGE L. QUINN, JR.,
815 15th St. N.W.,
Washington 5, D. C.,
IRVING RAND,
DONALD A. SCHAFER,
Public Service Building,
Portland 4, Oregon,
Attorneys for Petitioner.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 9-55

SUBJECT INDEX

	Page
Discrimination Among Non-competing Shippers	2
Reparations	5
Statutory Violations	5
Appendix	9

CASE INDEX

Florida East Coast Line vs. U. S., 234 U.S. 167, 185	6
U. S. vs. I. C. C., 198 F. 2d 958	6

In the Supreme Court

of the United States

THE MARTIN BROTHERS BOX COMPANY, a corporation,

Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION and SOUTHERN PACIFIC COMPANY, a corporation,

Respondents.

REPLY BRIEF

By the device of mislabeling the conclusions of the Commission into "findings of fact made by the Interstate Commerce Commission in its report" the respondent railroad carrier (Brief 1) endeavors to distort the question presented by the petition in this case, and to make it appear as though a question of fact were presented or involved. The Commission likewise in its brief indulges in the same contortion.

But, as Judge Pope stated in the court below:

> "this is a case in which all of the evidence, both that of the complainant and that of the carrier, shows with certainty that there was an unlawful preference and unreasonable prejudice and disad-

> vantage to the complainant within the meaning of the Act. There was no evidence whatever to the contrary."

The only findings referred to by the respondent carrier and by the Commission consist of the conclusion of the Commission, under the heading "Conclusions" in its report, that complainant had failed to establish that the carrier engaged in any unreasonable or otherwise unlawful practice or subjected complainant to any undue prejudice.

The respondent carrier, "regarding as determinations of fact" these conclusions of the Commission, parades again in its brief the contentions and bits of evidence originally presented to the Examiner and again presented to the Commission and again to the trial court and again to the Court of Appeals. None of these persons or tribunals was impressed by the parade. The case did not and cannot be made to turn upon the factual situation.

The appendix hereto summarizes the situation in respect of the facts.

Two vital considerations are presented by the petition.

DISCRIMINATION AMONG NON-COMPETING SHIPPERS

Of tremendous importance as concerns transportation by rail in the United States is the consideration of the requirement of substantial equality of treatment of interstate shippers who may not be competitors inter

sese. As to this, the carrier, for the first time in this Court (Brief 6) says,

> "We unequivocally state that in this brief we place no reliance on any showing of a lack of competitive relationship between petitioner and other shippers as supporting the Commission decision."

But when the Examiner held against the carrier on the merits of the case and recommended an award of reparations, the carrier took exceptions (10 and 12—R. 17) and, arguing the exceptions before the Commission, claimed error in the failure of the Examiner to find a lack of competitive relationship between the complainant and other shippers receiving more favorable treatment. This exception brought forth a finding by the Commission that,

> "The complainant has not established that any of its competitors was unduly preferred by the practices of the defendant here assailed." (R. 121)

Then, when the matter was presented to the trial court, Judge Solomon noted that the Commission's attorneys in their brief filed with him, referred to the lack of competitive conditions among shippers and "found some connection between such statement and the Commission's conclusions that no competitor of plaintiff was unduly preferred." (R. 68)

And when the Commission and the carrier were seeking to reverse Judge Solomon's decision, the Commission argued to the Court of Appeals that the record "also fails to show that appellee was subjected to competition since it produced only wire bound boxes and was not engaged in the sale of lumber as such. In the

absence of proof of competition an allegation of undue prejudice and preference cannot be sustained." (R. 863, Petition Appendix 17-18)

We thus see the railroad arguing to the Commission that proof must be made of competition between favored shippers and shippers discriminated against; and we see the Commission in its report finding that,

> "the complainant has not established that any of its competitors was unduly preferred by the practices of the defendant"

(and dismissing the petitioner's complaint in the face of its finding that an aggravated discrimination had been practiced); and we find the Commission, both before the District Court and before the Court of Appeals, urging the proposition that in the absence of proof of competition the allegations of undue prejudice and preference cannot be sustained.

With this record one Judge, of the four participating in the two courts, says in a foot note that the Commission's report affords no basis for an argument that there could be no violation of the Act unless undue preference was extended to competitors of the complaining shipper.

We think there is no doubt whatever in this record but that the Commission proceeded, as requested by the carrier, to deny relief because no competition between shippers was alleged and proved. And we think that this raises an important question of law which has not been but should be decided by this Court. In the words of Judge Pope (R. 863-864, Petition Appendix 24),

> "Even if there were doubt as to whether the Commission was proceeding upon the theory that the complainant must be denied relief in the absence of proof of competition, yet the very existence of the doubt would alone and without more require a reversal of its order because of the inadequacy and lack of clarity of the record. See Eastern-Central Assn. v. U. S., 321 U.S. 194, 210; U. S. vs. Chicago, M., St. P. & P. R. Co., 294 U.S. 499, 511."

REPARATIONS

Incidentally, a ground for dismissal of complainant's petition before the Commission was, in the language of the report,

> "the evidence presented falls far short of the requirements in a proceedings of this character to support an award of reparation." (R. 126)

Upon this conclusion also the complaint was dismissed. To the extent that the dismissal was premised upon this conclusion the Commission was likewise in error, as was found by the District Court Judge and by two of the three Judges in the Court of Appeals.

STATUTORY VIOLATIONS

Neither the Commission nor the District Court nor the Court of Appeals decided this matter upon any controverted question of fact as the briefs of the carrier and of the Commission would lead this Court to believe.

As a basis for decision Judge Healy, in the first of the prevailing opinions in the court below, says (R. 847-

848, Petition Appendix 2-3), that the Commission in its report made an "ultimate finding" that "complainant has failed to establish that [Southern Pacific] during the complaint period engaged in any unreasonable or otherwise unlawful practice, as alleged, in violation of Section 1 of the Act in furnishing or not furnishing cars to complainant, . . . or that [Southern Pacific] subjected complainant to any undue prejudice in violation of Section 3."

Then after "noticing the narrow scope of judicial review" of orders of the Commission, the Judge expresses the opinion,

> "It appears from the trial court's decision that it regarded the conclusions of the Commission, quoted above, as conclusions of law rather than as findings of ultimate fact. Such approach is erroneous." (R. 849, Petition Appendix 4-5)

Thus, there is squarely raised the question of the conflict of the opinion of Judge Healy with the decision of this Court in Florida East Coast Line vs. U. S., 234 U.S. 167, 185, and with the decision of the Court of Appeals for the District of Columbia in U. S. vs. I. C. C., 198 F. 2d 958, where it is held that the question identical with the one here involved presents not an issue of fact, or "ultimate fact", but one of law which it is the duty of the courts to examine and decide.

The other opinion in the Court of Appeals, that of Judge Chambers, is that there had been practiced "an unfair discrimination by Southern Pacific Company" (R. 854, Petition Appendix 11) and that the Examiner should be upheld and the Commission should be re-

versed, but that the court below and the Court of Appeals did not have "latitude" to rectify this injustice or to correct the error of the Commission.

In the third opinion Judge Pope correctly states (R. 856-857, Petition Appendix 14-15), "that not only the evidence of the complainant but that of the carrier as well, shows an unlawful preference and unreasonable prejudice and disadvantage within the meaning of the Act", and that in reaching its conclusion the Commission "rode too hard upon the word 'unduly' and based such conclusion not upon any findings of fact but upon a misreading and misinterpretation of the statutory provision [Section 3(1)] just aluded to."

Unless an administrative tribunal is to be the final and exclusive interpreter of the Act of Congress and is to be the final authority on statutory construction, the majority of the court below must be reversed.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

GEORGE L. QUINN, JR.,
815 15th St. N. W.,
Washington 5, D. C.,

IRVING RAND,
DONALD A. SCHAFER,
Public Service Building,
Portland 4, Oregon,
Attorneys for Petitioner.

APPENDIX

THE FACTUAL SITUATION

The Interstate Commerce Commission in its report made certain findings of fact. No contention is made that these facts found by the Commission were not in all respects based upon and supported by substantial evidence in the record.

The Commission found that during the period involved petitioner was furnished 593 cars. This is an adjusted figure to reflect the regulations of a service order of the Commission which permitted the use of two to three refrigerator cars in place of one box car (R. 113). This was an average of about 3.1 cars per working day.

The petitioner required and requested a minimum of 150 cars per month and had cars been supplied would have used 8.4 cars per day (R. 110-111; R. 122).

The carrier furnished an over all average of 80 percent of cars ordered on all divisions, including the Portland Division (R. 507-508; R. 797). At Portland and elsewhere, where the carrier had competition, no difficulty was experienced in obtaining cars from the carrier (R. 115-116).

In this Court the respondent carrier ignores these facts so found, and relies solely upon one of the conclusions reached by the Commission, which conclusion is not reconcilable with the facts found.

Bolstering its position as to this indefensible conclusion the respondent carrier makes certain contentions:

1. Petitioner's comparison of the furnishing to other shippers of eighty percent or more of the cars required, and the furnishing to petitioner of only thirty percent of the cars required, is said to be "fatally defective" since *written* orders of petitioner (not in the record, but referred to in certain exhibits) covered less than the number of cars supplied petitioner.

As to this contention, this respondent admits (Brief 11), "there was no requirement that car orders had to be in writing", and the Commission concedes (Brief 5) that petitioner "placed both written and oral orders", and the Commission found (R. 119) that petitioner indicated it wanted more cars than were furnished and that the written car order blanks were nothing more than a written confirmation, for the carrier, that petitioner wanted cars already assigned to it. Further, the Commission found (R. 125) that petitioner required and attempted to secure additional cars from the carrier.

2. The carrier next endeavors to make a showing that a large number of cars was held on petitioner's siding for unreasonable times, in fact claims (Brief 12) that 200 cars were held for from three to eight days. The Commission as to this matter found (R. 120) that one car was on hand 7 days, 2 on hand 6 days, 11 on hand 5 days, 22 on hand 4 days, and 56 on hand 3 days, and that many of these cars were of restricted destination. The trial court pointed out that according to the carrier's own exhibit when a car was held for more than three days from 13 to 23 other cars were moved in, loaded and moved out under load (R. 72).

3. The carrier endeavors to show that the petitioner canceled some of its orders for cars. The Commission made no such finding, and neither does the record justify such a finding. The record shows that at the hearing before the Examiner the carrier had a batch of car order blanks, not placed in the record, and that months after the occurrences complained of agents of the carrier had made various notations on these blanks, including presumably notations of cancellation (R. 586). The Commission states in its brief (page 4) that the petitioner required and needed a considerable number of cars in excess of those Southern Pacific was able to furnish. The Commission in the report it now attacks found and determined "that complainant desired, required, and attempted to secure additional cars from defendant;".

CERTIFICATE OF SERVICE

I hereby certify that I have this 9th day of September, 1955, served the foregoing reply brief upon counsel for respondents by mailing by first class air mail, postage fully prepaid, a copy thereof to each of the following: The Solicitor General of the United States, Department of Justice, Washington 25 D. C.; Samuel R. Howell, Associate General Counsel for Interstate Commerce Commission, Interstate Commerce Commission, Washington 25 D. C.; William L. Harrison, Interstate Commerce Commission, Flood Building, San Francisco 2, California; and James E. Lyons and Charles W. Burkett, Jr., 65 Market Street, San Francisco 5, California; and by mailing by first class mail, postage fully prepaid a copy thereof to James C. Dezendorf and George B. Campbell, 800 Pacific Building, Portland 4, Oregon.

.....

Irving Rand
Of Attorneys for Petitioner